(1)

Supreme Court, U.S.
FILED

941388 FEB 6 1995

OFFICE OF THE CLERK

No. ____

==========

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

BENNY W. BERRY, SUSAN E. BERRY

PETITIONERS

v.

STATE ex rel. JAMES W. PARRISH, Securities Commissioner of the State of Kansas,

RESPONDENTS

==========

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

==========

PETITIONERS - APPELLANTS, PRO SE

Benny W. Berry
C/O 1600 11th St.
Dodge City, Ks 67801
316-225-0645

Susan E. Berry
C/O 1600 11th St.
Dodge City, Ks 67801
316-225-0645

1990

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

I. Can the amended notice of appeal including the orders of June 25, 1993 and Aug. 20, 1993 be proper before the Court?

II. Has the Respondents the Court improperly applied the statutes, insofar as it is relevant to this action and as it applies to the petitioners?

III. Can an issue be raised for the first time on appeal?

IV. Can Summary Judgment be granted while material issues are still in dispute and discovery has not been complete?

V. Has the Petitioners 5th and 14th Amendment been violated?

VI. Should "Pro se" Petitioners be held to less stringent standards as an attorney?

VII. Does the application of K.S.A. 17-1252(j) "investment contract" violate the due process as it applies to the Petitioners?

VIII. Can a person be denied equal protection of the laws without violating the 14th Amendment to the Federal Constitution?

IX. Can a State Court rule on an issue that is in conflict with the Federal Court decision of another State Court case?

X. Can a State Statute pass the "void for vagueness" attack if persons of common intelligence differ to its application and guess at its meaning?

XI. Can a Court grant a criminal sanction in a civil case?

PARTIES TO THE PROCEEDINGS

All the parties in the United States Court of Appeals for the Tenth Circuit are listed in the caption.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.....i

PARTIES TO THE PROCEEDINGS.....ii

TABLE OF AUTHORITIES.....v

OPINIONS BELOW.....1

BASIS FOR JURISDICTION.....1

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED.....1

STATEMENT OF THE CASE.....3

REASONS FOR GRANTING THE WRIT.....5

I. THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW WHICH CONSISTENT WITH THE RULES OF THE KANSAS COURT RULES AND PROCEDURE AND THE RULES OF THE SUPREME COURT OF THE UNITED STATES ON CERTIFIED MAILING OF AN AMENDMENT TO AN APPEAL BEING MAILED IN GOOD FAITH, AS NOT BEING CONSIDERED.....6

A. The Appellate Court erred in stating that amended notice of appeal mailed certified with return receipt to the court with a signed copy of being received from the opposing council was not considered.....

II. THE RESPONDENTS AND THE COURTS HAVE IMPROPERLY APPLIED THE STATUTES, INSOFAR AS IT IS RELEVANT TO THIS ACTION AND AS IT APPLIES TO THE PETITIONERS AND DENIED ACCESS TO THE STATUTE K.S.A. 17-1262(a)...7

A. The Court erred in failing to acknowledge the evidence presented supporting an isolated transaction under K.S.A. 17-1262(a).....

B. The Appellate Court erred in stating that the petitioners failed to claim the exemption when it was

first claimed on the unanswered Motion to Set Aside Judgment and Vacate Order filed with the court on Feb. 18, 1994.....

C. The Appellate Court erred by denying Petitioners equal protection of the laws by denying access to K.S.A. 17-1262(a).....

III. THE COURT OF APPEALS DECISION ERRED USING STATE COURT CASE DECISION PERTAINING TO ISSUES RAISED FOR FIRST TIME ON APPEAL CONFLICTS ISSUES WITH INVOLVED.....11

A. The Appellate court erred deciding that an issue cannot be raised in appellate court when State Appellate Court does have the power to do so in exceptional circumstances which circumstances are apparent and Appellate Court failed to make a Separate Determination of whether they apply.....

IV. APPELLATE COURT ERRED IN UPHOLDING SUMMARY JUDGMENT AND STATING THAT PETITIONERS HAVE NOT CITED TO ANY UNANSWERED DISCOVERY REQUESTS WHEN RECORD SHOWS THE CONTRARY ALONG WITH FACTUAL ISSUES IN DISPUTE.....13

A. The Court of Appeals erred in upholding District Court ruling when record is stated by the Court that there is unanswered discovery and acknowledged material issues still in dispute....

V. THE COURT OF APPEALS DECISION ERRED USING STATE COURT CASE DECISION PERTAINING TO PRO SE PETITIONERS WHEREAS ISSUES INVOLVED CONFLICT WITH PRESENT CASE AND FEDERAL COURT CASE JUDGMENTS.....16

A. Appellate Court erred in deciding a important federal question in a way that conflicts with decisions of this Court by using a State Court Case with unrelated issues.....

VI. WHEREAS TWO DIFFERENT STATE AGENCIES INTERPRET THE TERM "INVESTMENT CONTRACT" AS TWO DIFFERENT MEANINGS WITH SEVERAL PERSONS OF COMMON INTELLIGENCE GUESSING AT IT'S MEANING AND DIFFERED TO IT'S APPLICATION.....18

A. The Appellate Court erred in not recognizing the vagueness of the term "investment contract" when the record shows 3,486 persons of common intelligence with various state agencies and a stock broker that differed to it's application to that as the same of the Texas Security commissioner.....

VII.CONCLUSION.....22

TABLE OF AUTHORITIES

CASES

Chicago, Burlington, &c. R'd v. Chicago, 166 U.S. 226, 234,(1897).....11

Raymond v. Chicago Traction Company, 207 U.S. 20, 36,(1907).....11

Board of Regents v. Roth, 408 U.S. 564, 569-70, 92 S.Ct. 2701, 33 L.Ed. 2d 548,(1972).11

Dane v. Jackson, 256 U.S. 589,(1921).....11

Stebbins v. Riley, 268 U.S. 137 (1925).....11

Newark Evening News Pub. Co. v. King Features Syndicate, 7 F.R.D.645 N.J.,(1948).....14

Zig Zag Spring Co. v. Comfort Springs Corp., 89 F.Supp. 410. N.J.,(1950).....15

Hicks ex. rel. Feiock v. Feiock, 108 S. Ct. 1423, 1429-30,(1988).....16

Koff v. Butterworth 765 F.Supp. 716, (M.D.Fla. 1991).....17

Holmes v. Goldin, 615 F.2d 83, 85 (2d Cir. 1980).....17

Estelle v. Gamble, 429 U.S. 97, S.Ct. 285, 50 L.Ed.2d. 251,(1976).....17

Kentucky v. Graham, 473 U.S. 159, 167 n. 14, 105 S.Ct. 3099, 3106 n. 14 87 L.Ed.2d. 114,(1985).....17

Haines vs Kerner 404 US 519, 30 L.Ed. 2d. 652, 92 S. Ct. 594, reh den 405 U.S. 948, 30 L.Ed. 2d. 819, 92 S. Ct. 963,(1972).....17,18,21

Freeman v. State, Dept. of Corrections 764 P.2d 445, (Idaho App. 1988)(1988).....18,21

U.S. v. Rogers, 602 F.Supp. 1332. Colo (1985).19

Sowers v. Ohio Civil Rights Commission, 20 Ohio Misc. 115, 252 N.E.2d 463, 476 (1969).19

Hopkins v. Mayor & Council of city of Wilmington, 600 F.Supp. 542, Del. (1984).....20

Byrd v. City of Atlanta, 709 F.Supp. 1148. Ga. (1989).....21

Constitution, Statutes, Regulations

14th Amendment to the federal Constitution.....11,19,20,21

Fed. Rules Civ.Proc., rule 56, 28 U.S.C.A.....15

42 U.S.C.A. 1983.....17

U.S.C.A. Const.Amends. 5,.....5,20

Black's Law Dictionary 6th edition.....10,19

State Cases

Allen v. Schauf, 202 K. 348, 353, 355, 356, 358, 359, 449 P.2d 1010,(1969).....8

Joe Self Chevrolet, Inc v. Board of Sedgwick County Comm,rs, 247 Kan. 625, 633,802 P.2d 1231 (1990).....9

Noel v Pizza Hut, Inc. 15 K. App 2d 225, 223, 805 P.2d. 1244,(1991).....15

Mangiaracina v. Gutierrez, 11 Kan. App. 2d 594, 730 P.2d 1109, 1111 (1986).....16

State v. Garrett, 684 P.2d. 413, 235 Kan. 768,(1984).....19

Capital Services v. Dahlinger Pontiac-Cadillac, Inc., 657 P.2d. 36, 232 Kan. 419, (1983).....19

In re Uihlein's Will, 187 Wis. 101,(1925)....20

State Constitution, Statutes, and Regulations

K.S.A. 17-1252.....18,19

K.S.A. 17-1254.....7,9,10

K.S.A. 17-1255.....7,9,10

K.S.A. 17-1262.....7,8,10,11,12

K.S.A. 17-1272 12

K.S.A. 60-256.....10

K.A.R. 81-5-3.....8,9

K.A.R. 81-1-1.....8

2 of the Bill of Rights of the Kansas Constitution.....11

Kansas Administrative Law with Federal References, 24-8 to 24-9 (1982).....13

Title 19 Art. 581-4(a)(Texas).....19

Kavsas civil code and Procedure 60-226 (a)...14

Hill v. Hill, 13 Kan. App. 2d 107, 108,
763 P.2d 640 (1988).....9

State v. Puckett, 230 K. 596,
640 P.2d 1198 (1981).....10,12

Martinez v. Matthews, 544 F.2d. 1233.
Fla.,(1976).....10

State ex rel. Owens v. Colby,
231 K. 498,(1982).....11

Board of Sedgwick County Comm'rs v. Kiser
Living Trust 250 Kan. 106 (1992).....12,13

Pierce v. Board of County Commissioners, 200
Kan. 74, 434 P.2d 858,(1967).....5,12

Swift v. Kelso Feed Co., 161 Kan. 383,
388 (1946).....12

Shinkle v. State Highway Commission, 202 Kan.
311, 318, 448 P.2d 12,(1968);.....13

Fields v. Stauffer Publications, Inc. 2 Kan.
App. 2d 323, 325, 578 P.2d 1138, re. denied
225 Kan 843,(1978).....13

Holmquist v. D-C, Inc. 1 Kan. App. 2d 291,
298-300, 563 P2d 1112,(1977).....13

Hemry v. State Board of Pharmacy, 232 Kan 83,
652 P.2d. 670 (1982) see Ryan, Kansas
Administrative Law with Federal References,
24-8 to 24-9 (1982).....13

Lee vs Mobil Oil Corp., 452 P.2d 857,
203 Kan. 72,(1969).....14

Secrist v. Turley, 412 P.2d 976,
196 Kan. 572,(1966).....14

Lawrence v. Deemy, 461 P.2d 770,
204 Kan.299,(1969).....15

OPINIONS BELOW

The final decision from Shawnee District Court filed February 14, 1994 but to include the decisions on January 7, 1994; November 19, 1993; March 15, 1993; the Decision, Order, Order appointing Receiver, and Order of Permanent Injunction on August 20, 1993; June 25, 1993; March 15, 1993, (Kan. 92-cv1427).

Opinion of Court of Appeals filed August 19, 1994, dismissed-titled Not Designated For Publication-(Kan. 93-70841-A); Motion for Rehearing Denied September 14, 1994 (Kan. 93-70841-A); Petition for Review Denied November 08, 1994 (Kan. 93-70841-AS).

BASIS FOR JURISDICTION

The final judgment of the court of appeals was entered on November 08, 1994. This Court has jurisdiction to review the court of appeal pursuant to Rule 10.1(b)(c).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

K.S.A. 17-1254(a); Registration required for broker-dealer..

(a) It is unlawful for any person to engage in business in this state as a broker dealer, except in transactions exempt under K.S.A. 17-1262 and amendments thereto, unless such person is registered as a broker-dealer under this section.

K.S.A. 17-1255. Unlawful to sell or offer for sale certain unregistered securities. It is unlawful for any person to offer or sell any security in this state, except securities exempt under K.S.A. 17-1261 or when sold in transactions exempt under K.S.A. 17-1262, unless such security is registered by notification under.....

x

K.S.A. 17-1262. Exempt Transactions.

Except as expressly provided in this section, K.S.A. 17-1254, 17-1255, 17-1256, 17-1257, 17-1258, 17-1259, 17-1260, and amendments thereto, shall not apply to any of the following transactions:

(a) Any isolated transaction, whether effected through a broker dealer or not.

K.A.R. 81-5-3. Isolated Transaction exemption.

A security or securities shall be deemed to have been offered and sold in an isolated transaction pursuant to K.S.A. 1985 Supp. 17-1262(a), as amended by L. 1986, Ch. 332, Sec. 16, provided:

(a) no twelve month period in which the date of the sale can be included contains more than five sales of the securities in Kansas by the seller and affiliates, or by or for the benefit of the issuer;

K.S.A. 17-1252 Definition: (j)

"Security" means any note; stock; treasure stock; bond; debenture;.....; investment contract;....

Title 19 Art. 581-4 Definitions (Texas)

A. The term "security" or "securities" shall include any share, stock treasury stock,.... note, bond, debenture,....., investment contract,.....

United States Constitution, Amendment V:

No person shall.....be deprived of life, liberty, or property, without due process of law.....

United States Constitution, Amendment XIV:

No State shall make or enforce any law which shall abridge the privileges or immunities....., nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person.....the equal protection of the laws.

STATEMENT OF THE CASE

This case is a companion case to 92CV784. Respondents filed this action on November 8, 1990, Then filed 92CV1427 on Nov. 6, 1992 (app. 1).The facts are identical in both cases, the only difference in the 2 cases being the number of Petitioners. Respondents have chosen to proceed with 92cv1427.

Petitioner's, Benny & Susan Berry, (along with 3,484 other people) became aware of the program known as World of Product Cooperative, owned and operated solely by Mary Schermerhorn out of Bracketville Texas. Prior to proceeding, further with the program, however, the Petitioners checked with every appropriate Kansas and Texas state agencies regarding the legality of WPC in the state of Kansas, to include the Consumer Protection Agency of the State of Kansas and the Attorney General of the State of Kansas, who gave written assurance that there was no evidence available to that office that WPC was in any way violating Kansas laws (Brief of Appellant exhibit F). Based on these assurances that no law was being violated, and further based on the fact that the Texas State Securities Board declared WPC not violating Texas Securities Statutes, (app. 11) the Petitioners felt assured that the program was not unlawful.

Subsequently, the Kansas Security Commission became involved by issuing a summons against the Petitioners Nov. 6, 1992 (app. 1). The Petitioners answered the summons and denied all charges in the summons. The Petitioners motioned to Dismiss and objected to Petition for Permant Injuction (R. ONE pg 41) challenging the jurisdiction of the Securities Commission. The Court denied the motion. (app. 2). Petitioners motioned for Reconsideration & Clarification and requested oral arguments(R. ONE pg 82). Respondents filed for Summary Judgment and Petitioners filed Objection to Summary Judgment describing genuine issue as to material facts in despute with Memorandum attached (R. ONE pg 144). On the Memorandum in Support of Objection to Motion For Summary Judgment: "The affidavit that is submitted by Gary Fulton is made in BAD FAITH as the affidavit does conflict with the testimony made by Gary Fulton underoath on January 15, 1992, as that of hearsay. Attachments were also made after the signing and acknowledgement of the affidavit by Gary Fulton". (R.

ONE pg. 149). On May 14; 1993 a pretrial conference was held in which the Petitioners were granted discovery until Aug. 15, 1993. Subsequent to the pretrial, NO DISCOVERY OR EVIDENCE was presented to the court by either party. In the oral arguments on May 14, 1993: Court-" I would anticipate at this point that there is still this document exchange, which is outstanding discovery that would occur, that the Court would establish a discovery deadline for all discovery to have been completed in this matter by August 15,..." (R. III, 43, 2-7). The Petitioners were proceeding with discovery and requested production of documents (R. ONE-A pg. 177) which to this day has not been answered. No hearing has been held in either case and summary judgment was given to the Respondents while good faith disputes over material facts were and are still present. On June 25, 1993 Summary Judgment was rendered against the Petitioners,(App. 3), clearly before the deadline of August 15. The decision was based on a affidavit and Petitioners inability to answer the summary judgment as an attorney by denying each paragraph seperately. Petitioners requested to correct their response to Motion for Summary Judgment to conform to the stringent standards as drafted by lawers (R. IA, 190,) and Motioned the Court to Set Aside Judgment And Vacate Order as to the presents of good faith disputes over material fact as to no physical evidence being presented showing involvement or to the extent of that involvement (R. ONE-A pg. 209). The Court issued a Order of Permenant Injuction, Memorandum Decision and Order, Order Appointing Reciever and Order against the Petitioners (Appendix 4).

After the reciever started garnishing Petitioners wages the petitioners filed a Application for Tempory Restraining Order and Motion to Vacate Garnishments (R. ONE-B 273) on November 19, 1993 which a hearing was held on the same day and was denied(R.TWO). Petitioners Amended Motioned to set aside judgment and Vacate Order of August 20, 1993 (app. 12), (Does not show in record but was denied on Jan. 7, 1994 (app. 5) Motioned for Relief From Judgment or Order and Motion For New Trial on grounds that through mistake and inadvertence (60-260 b) the Petitioners were under the assumption that on the oral arguments on May 14, 1993 their demand for jury trial was granted and did not allow the Petitioners opportunity to present their evedence and be heard on the merits. Respondents answered Motions on

Dec.30, 1993. Court denied Motions on Jan. 7, 1994 (app. 5). The Petitioners Replied to Respondents answer to Petitioners Motions stating this Reply challenges the Order by the Court on June 25, 1993. This Reply Motion was denied on February 14, 1994 (app. 6).

The Petitioners first Appealed on November 30, 1993 (R. ONE-B 302) and amended the appeal three (3) times to include motions that were denied after appeal was sought and also to include prior decisions and judgments. (R. ONE-B 331, 347, and see I of Reasons For Granting Writ). After invoking the jurisdiction of the Appellate Court, it was discovered through a question of law on the admitted facts presented by the respondents that the issue of an isolated transaction exemption was apparent and necessary to be presented to serve the ends of justice. This circumstance has been upheld in several cases including Pierce v. Board of County Commissioners, 200 Kan. 74, 434 P.2d 858 (1967). The Petitioners claimed the exemption of an isolated transaction asking for equal protection of the law on a Motion to Set Aside Judgment and Vacate Order filed in the Appellate Court on February 18, 1994. This Motion was to be considered by hearing panel, (action taken by the court 05/19/94) (app. 13), and has not been answered. Appellate Court denied appeal (app. 7).

On the opinion of the Appellate Court it was stated the Appellate Court had no record of an amended appeal which was mailed through the United States Postal Service with certified mail receipt. In the Motion for Rehearing a copy of the amended appeal was signed by the opposing council (as being received) and was sent with a copy of the certified mail receipt to the court to show the good faith of both the petitioners and the respondents. The Appellate Court showed no response in verifing the acceptance of the ammended appeal which included the ruling on June 25, 1993; Motion to Set Aside Judgment or Order on September 3, 1993; Amended Motion to Set Aside Judgment or Order on November 24, 1993; Motion for Relief From Judgment or Order and Motion for New Trial on November 30, 1993.
Motion for Rehearing was denied September 14, 1994; (app. 8); A Affidavit and/for copy of Application to Ammend Appeal was sent with Petition For Review but was denied on November 08, 1994 (app. 9).

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW WHICH CONSISTENT WITH THE RULES OF THE KANSAS COURT RULES AND PROCEDURE AND THE RULES OF THE SUPREME COURT OF THE UNITED STATES ON CERTIFIED MAILING OF AN AMENDMENT TO AN APPEAL BEING MAILED IN GOOD FAITH, AS NOT BEING CONSIDERED

A. The Appellate Court erred in stating that amended notice of appeal mailed certified with return receipt to the court with a signed copy of being received from the opposing council was not considered.

The Petitioner Benny Berry mailed through the United States Mail certified with return receipt requested 1 original and 3 copies of an Application for Permission to Amend Appeal on January 28, 1994 to Carol G. Green, Clerk, Appellate Court of Kansas, Kansas Judicial Center, 301 S.W. 10th Avenue, Topeka, Kansas 66612-1507. (App. 14). A copy of the Application for Permission to Amend Appeal was also mailed to Caroline M. Ong, Office of the Securities Comm., 618 South Kansas, 2nd Floor, Topeka, Kansas 66603 on January 28, 1994.

The Application to Amend Appeal was to consolidate the ruling of June 25, 1993 with the rulings of January 7, 1994 to prevent the Court from becoming confused on the issues involved in this Appeal.

The Petitioners contend that the authority for the District Court to deny the Petitioners their motions and application on January 7, 1994 and November 19, 1993 derives from the orders issued on August 20, 1993 and June 25, 1993. The Application for Temporary Restraining Order was to stop the actions of the Securities Commissioner from further action in enforcing the Orders of the Court on June 25, 1993 and August 20th, 1993. An issue of the Petitioners was the deprivation of due process in the granting of summary judgment. The granting of summary judgment before discovery being complete. The record shows discovery incomplete. The Court has acknowledged that there is still a document exchange to take place, which outstanding discovery would occur, that the Court would establish a discovery deadline...August 15, ... (R. III, 43, 2-7).

II. THE RESPONDENTS AND THE COURTS HAVE IMPROPERLY APPLIED THE STATUTES, INSOFAR AS IT IS RELEVANT TO THIS ACTION AND AS IT APPLIES TO THE PETITIONERS AND DENIED ACCESS TO THE STATUTE K.S.A. 17-1262(a)

A. The Court erred in failing to acknowledge the evidence presented supporting an isolated transaction under K.S.A. 17-1262(a)

B. The Appellate Court erred in stating that the petitioners failed to claim the exemption when it was first claimed on the unanswered Motion to Set Aside Judgment and Vacate Order filed with the court on Feb. 18, 1994

C. The Appellate Court erred by denying Petitioners equal protection of the laws by denying access to K.S.A. 17-1262(a)

The Memorandum Decision and Order determined that "Members of WPC did not have any role in the management or organization of WPC. The WPC program and memberships were created and controlled by the Schermerhorns." (R. ONE-A, PAGE 182, PARAGRAPH 9).

The Memorandum Decision and Order determined that "The Kansas Defendants were all members of WPC". (R. ONE-A, PAGE 183, PARAGRAPH 12).

The Memorandum Decision and Order determined "The Kansas Defendants all attained the Chief Advisory Board member level and received the $50.00 payment from new members entering the WPC program". (R. ONE-A, PAGE 184, PARAGRAPH 14). The Memorandum Decision and Order determined that "The only requirement for a WPC member to be eligible to reach the Chief Advisory Board member level and to receive payments was to have sold <u>two</u> WPC membership packets." (R. ONE-A, PAGE 182, PARAGRAPH 7)

The Memorandum Decision and Order failed to determine that the Kansas Petitioners exceeded two transactions. The Courts determination that the Petitioners have violated K.S.A. 17-1255 and 17-1254 is unsupported and contrary to the statutes as written. Whereas K.S.A. 17-1254 provides insofar as it is relevant to this action, as follows:

K.S.A. 17-1254(a); Registration required for broker-dealer.....

> (a) It is unlawful for any person to engage in business in this state as a broker dealer, **<u>except in transactions exempt under K.S.A.</u>**

17-1262 and amendments thereto, unless such person is registered as a broker-dealer under this section.

K.S.A. 17-1255 provides insofar as it is relevant to this action, as follows:

K.S.A. 17-1255. Unlawful to sell or offer for sale certain unregistered securities. It is unlawful for any person to offer or sell any security in this state, except securities exempt under K.S.A. 17-1261 or when sold in transactions exempt under K.S.A. 17-1262, unless such security is registered by notification under.....

The question presented is one of first impression and requires a consideration of K.S.A. 17-1262 and pertinent regulations adopted by the Securities Commissioner.

K.S.A. 17-1262 provides insofar as it is relevant to this action, as follows:

K.S.A. 17-1262. Exempt Transactions. Except as expressly provided in this section, K.S.A. 17-1254, 17-1255, 17-1256, 17-1257, 17-1258, 17-1259, 17-1260, and amendments thereto, shall not apply to any of the following transactions:

(a) Any isolated transaction, whether effected through a broker dealer or not.

At the time of the transactions in question the Securities Commissioner had adopted and published regulations pursuant to the statute.

What constitutes "isolated transaction" and effect of administrative regulation 81-1-1 considered. Allen v. Schauf, 202 K. 348, 353, 355, 356, 358, 359, 449 P.2d 1010

K.A.R. 81-5-3 provides insofar as it is relevant to this action, as follows:

K.A.R. 81-5-3. Isolated Transaction exemption. A security or securities shall be deemed to have been offered and sold in an isolated transaction pursuant to K.S.A. 1985 Supp. 17-1262(a), as amended by L. 1986, Ch. 332, Sec. 16, provided:

(a) no twelve month period in which the date of the sale can be included contains more than

five sales of the securities in Kansas by the seller and affiliates, or by or for the benefit of the issuer;

In calculating the number of sales in a twelve month period, sales made in violation of K.S.A. 17-1255 and sales exempt from registration pursuant to paragraph a of K.S.A. 17-1262 as amended by L, 1986, Ch. 332, Sec. 16, shall be taken into account.

"Rules do not permitt courts to read into a statute something that does not come within the word of the statute". Joe Self Chevrolet, Inc v. Board of Sedgwick County Comm,rs, 247 Kan. 625, 633,802 P.2d 1231 (1990).

" When construing a statute, we should give words in common usage their natural and ordinary meaning." Hill v. Hill, 13 Kan. App. 2d 107, 108, 763 P.2d 640 (1988).

As indicated, the act expressly provides that none of its provisions imposing any liability applies to any act done or omitted in good faith in reliance upon the Commissioners regulations. But, if it is applicable to the transaction in question, the Petitioners are entitled to rely upon its provisions defining an "isolated transaction".

Further, the Memorandum Decision and Order makes no determination of any evidence of a public offering as defined by K.A.R. 81-1-1 pursuant to 81-5-3(b) that would not be considered an isolated transaction.

Further, the Memorandum Decision and Order makes no determination of intent by the Petitioners to at any time exceed K.A.R. 81-5-3(a) that would not be considered an isolated transaction pursuant to 81-5-3(d). The Memorandum Decision and Order determined at (R. ONE-A, PAGE 182, PARAGRAPH 7). "The only requirement for a WPC member to be eligible to reach the Chief Advisory Board member level and to receive payment was to have sold two WPC membership packets." This shows no intent by the Petitioners to exceed K.A.R. 81-5-3(a).

Petitioners contend that under the District Court findings of fact of the case the alleged action of the Petitioners are not subject to the K.S.A. 17-1254 and

17-1255. The Petitioners assert the evidence is undisputed that "The only requirement for a WPC member to be eligible to reach the Chief Advisory Board member level and to receive payment was to have sold two WPC membership packets." (R. ONE-A, PAGE 182, PARAGRAPH 7). The Respondent has not shown and the District Court has not determined that the Petitioners have violated the Kansas Securities Act.

The Petitioners submit that this issue was not raised in the District Court, however the evidence was presented by Affidavit of Gary Fulton (R. ONE PAGE 108) and this issue involves a question of law " An issue which involves the application or interpretation of a law and hence within the provence of the judge....." Black's Law Dictionary 6th edition. Also the facts submitted should be considered as an isolated transaction to serve the interest of justice and to prevent a denial of a fundamental right of the Petitioners of access to K.S.A. 17-1262(a) and should be considered.

> "The Appellate Court may consider issues not raised at trial or on appeal where necessary to serve interests of justice or prevent denial of fundamental rights". State v. Puckett, 230 K. 596, 640 P.2d 1198 (1981).
>
> "Rule of appellate courts should not consider issues raised first time on appeal can give way when pure questions of law and refusal to consider it would result in miscarriage of justice". Martinez v. Matthews, 544 F.2d. 1233. Fla. (1976).

The evidence submitted by the Respondent and the Finding of Fact of the District Court support an isolated transaction under the provisions of K.S.A. 17-1262 and consequently registration of such security or person was not required under the provisions of K.S.A. 17-1254 and 17-1255. The Petitioners evidence for claim of exemption is the evidence presented by the Respondent.

The Petitioners have used the evidence presented by the Respondent as their defense. The use of this evidence is presented and claimed in the Petitioners Motion to Set Aside Judgment and Vacate Order filed with the Appellate Court on Feb. 18, 1994 and further presented and claimed in the Petitioners Brief and Reply Brief filed with the Appellate Court. The Court has not answered the Motion. Under the facts of case

the actions of the Petitioners would not be subject to act. State ex rel. Owens v. Colby, 231 K. 498,

By denying the Petitioners the access to the admitted facts of the case has deprived the Petitioners' of their property without due process of law by denying the Petitioners equal protection of the laws in violation of the 14th Amendment to the federal Constitution and 2 of the Bill of Rights of the Kansas Constitution.

> " The State may not by any of its agencies disregard the prohibitions of the Fourteenth Amendment". Chicago, Burlington, &c. R'd v. Chicago, 166 U.S. 226, 234. Raymond v. Chicago Traction Company, 207 U.S. 20, 36.

By not allowing the Petitioners to use the admitted fact as evidence to the claim of exemption of K.S.A 17-1262(a) the Court is denying the Petitioners fundamental right and benefit to the statutes.

> " The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount." Board of Regents v. Roth, 408 U.S. 564, 569-70, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1972).

> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." 408 U.S. at 577, 92 S.Ct. at 2709. " There is therefore no taking of property without due process of law." Dale v. Jackson, 256 U.S. 589; Stebbins v. Riley, 268 U.S. 137.

III. THE COURT OF APPEALS DECISION ERRED USING STATE COURT CASE DECISION PERTAINING TO ISSUES RAISED FOR FIRST TIME ON APPEAL CONFLICTS ISSUES WITH INVOLVED

A. The Appellate court erred deciding that an issue cannot be raised in appellate court when State Appellate Court does have the power to do so in exceptional circumstances which circumstances are

apparent and Appellate Court failed to make a Separate Determination of whether they apply

The Kansas Petitioners arguments concerning the isolated transaction exemption is properly before this Court. Board of Sedgwick County Comm'rs v. Kiser Living Trust 250 Kan. 106 and State v. Puckett, 230 K. 596, 640 P.2d 1198 (1981) the Court of Appeals held that an appellate court will not ordinarily consider an issue which has not been raised by the parties on appeal, the court does have the power to do so in exceptional circumstances. The issue has been addressed on several occasions and in Pierce v. Board of County Commissioners, 200 Kan. 74, 434 P.2d 858 (1967) the opinion recognized three exceptions to the general rule;

(1) Cases where the newly asserted theory involves only a question of law arising on proved or admitted facts and which is finally determinative of the case, (5 Am. Jur. 2d, supra);

(2) Questions raised for the first time on appeal if consideration of the same is necessary to serve the ends of justice or to prevent denial of fundamental rights, (5 Am. Jur. 2d, supra, 549, p. 34; see, also, Swift v. Kelso Feed Co., 161 Kan. 383, 388.)

The Petitioners contend that recognized exceptions are met in this case:

(1) This asserted theory involves a question of law in the application of a statute. The Burden of Proof is on the party claiming the exemption and the Petitioners' are claiming and have proved the exemption. The admitted facts support the exemption and the Petitioners are entitled to K.S.A. 17-1272 of an isolated transaction pursuant to K.S.A. 17-1262(a). The exemption decision would be determinative of the case. The Petitioners hold that because it involves only a legal question arising on admitted facts finally determinative of the case and consideration is necessary to serve the ends of justice and prevent the denial of fundamental rights, the Appellate Court may consider the issue even it was not considered by the trial court. State v. Puckett, 230 K. 596, 640 P.2d 1198 (1981); Pierce v. Board of County Commissioners, 200 Kan. 74, 434 P.2d 858 (1967).

(2) The claim of exemption raised for the first time on appeal is necessary to prevent a denial of a

fundamental right to the benefit of such exemption. To deny the Petitioners equal access to the statute would violate the equal protection of the law.

The rule of Pierce has been recognized in several later cases. Shinkle v. State Highway Commission, 202 Kan. 311, 318, 448 P.2d 12(1968); Fields v. Stauffer Publications, Inc. 2 Kan. App. 2d 323, 325, 578 P.2d 1138, re. denied 225 Kan 843 (1978); and Holmquist v. D-C, Inc. 1 Kan. App. 2d 291, 298-300, 563 P2d 1112(1977). Board of Sedgwick County Comm'rs v. Kiser Living Trust 250 Kan. 106. There is, therefore, precedent for the proposition that an appellate court may, under unusual circumstances, consider issues which were not raised in the trial court.

The Kansas Petitioners contend that the issues briefed by the Petitioners and argument concerning the isolated transaction is properly before the court.

> "A court is a higher judicial body and may substitute it's judgment for that of an agency on questions of law. Usually a court will give much difference to the agencies interpretations of it's regulations. Hemry v. State Board of Pharmacy, 232 Kan 83, 652 P.2d. 670 (1982); see Ryan, Kansas Administrative Law with Federal References, 24-8 to 24-9 (1982).

The court must reverse the decision of the appellate courts of Kansas, set aside the judgment and vacate the order signed by the district court on June 25, 1993.

IV. APPELLATE COURT ERRED IN UPHOLDING SUMMARY JUDGMENT AND STATING THAT PETITIONERS HAVE NOT CITED TO ANY UNANSWERED DISCOVERY REQUESTS WHEN RECORD SHOWS THE CONTRARY ALONG WITH FACTUAL ISSUES IN DISPUTE

A. The Court of Appeals erred in upholding District Court ruling when record is stated by the Court that there is unanswered discovery and acknowledged material issues still in dispute

Under the factual circumstances set forth in this Appeal, the District Court erred in entering summary judgment in favor of the Plaintiffs. Summary judgment was prematurely granted and denied the parties the opportunity to complete their dispovery and present

evidence on the material factual issues present in the case.

Under Kansas civil code and Procedure 60-226(a) " Parties may obtain discovery by one or more of the following methods: Depositions upon oral examination or written questions; ....;production of documents..." The Court had granted depositions to the petitioners (R. III, 31, line 13); Also the Request for Production of Documents (R. 1A, 177) has not been answered conflicting to the statement of the Appellate Courts opinion on August 19, 1994.

" Parties must always be afforded a trial when there is good faith dispute over material facts". Lee vs Mobil Oil Corp., 452 P.2d 857, 203 Kan. 72. The material factual issue of this case is "the affidavit that is submitted by Gary Fulton is made in BAD FAITH as the affidavit does conflict with the testimony made by Gary Fulton under oath on January 15, 1992, as that of hearsay. Attachments were also made after the signing and acknowledgement of the affidavit by Gary Fulton". (R. ONE pg. 149)

"Summary judgment must be denied if it appears from the record that there is a genuine issue of fact though it may relate only to the credibility and weight of the testimony. Fed. Rules Civ.Proc., rule 56, 28 U.S.C.A. Newark Evening News Pub. Co. v. King Features Syndicate, 7 F.R.D.645 N.J. (1948).

The Court acknowledged there were factual issues still in dispute. (R. 3, Page 27)." Parties must always be afforded a trial when there is good faith dispute over material facts". Lee vs Mobil Oil Corp., 452 P.2d 857, 203 Kan. 72.

> "Court should not determine factual issues on motion for summary judgment but should search record for purpose of determining whether a factual issue exists, and if there is reasonable doubt as to existence of a material fact, motion for summary judgment will not lie." Secrist v. Turley, 412 P.2d 976, 196 Kan. 572.

The Petitioners were proceeding with due diligence with discovery. The Petitioners had submitted the Request for Production of Documents. (R. 1-A PAGE 177). Summary Judgment was granted while discovery was still uncompleted and material issues still in dispute.

> "Summary Judgment should not be entered if there remains genuine issues of material fact, nor

where opposing party is proceeding with due diligence with his pretrial discovery but has not had an opportunity to complete it". K.S.A. 60-256(c) Lawrence v. Deemy, 461 P.2d 770, 204 Kan.299.

The Court will order the documents to be made available to all the defendants prior to summary judgment being granted.(R. III, 23, 1-3)

The Court has acknowledged that there is still outstanding discovery that would occur,

Court: " I would anticipate at this point that there is still this document exchange, which is outstanding discovery that would occur, that the Court would establish a discovery deadline for all discovery to have been completed in this matter by August 15, ..." (R. III, 43, 2-7)

The record shows a request for Production of Documents (R. 1-A, page 177) from the Respondent. The Petitioners have not received a response from the Respondent for these documents. This request was made prior to the Order of the Court on June 25, 1993 and discovery was incomplete. The request for each sale of each Petitioner is vital for the Petitioners Defense.

The Petitioners submit that Summary Judgment should not be granted prior to the utilization of the discovery procedures. The Petitioners defense is shaped by the facts which are unveiled through the discovery process.

The Court abused its discretion in granting Summary Judgment prior to the Petitioners completion of discovery.

"The petitions principal purpose is notice, and the ultimate theory on which the modern lawsuit is tried is shaped by the fact which are unveiled through the discovery process." Noel v Pizza Hut, Inc. 15 K. App 2d 225, 223, 805 P.2d. 1214.

"To authorize summary judgment, complete absence of any genuine fac issue must be apparent from record and all doubts thereof must be resolved against party moving for such judgment". Fed.Rules Civ.Proc. rule 56, 28 U.S.C.A. Zig Zag Spring Co. v. Comfort Springs Corp., 89 F.Supp. 410. N.J. (1950).

The Court further erred in granting the Summary judgment in that it granted a criminal sanction in a civil case.

> " The critical features are the substance of the proceeding and the character of the relief that the proceeding will afford, 'If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.'. . . . The character of the relief imposed is thus ascertainable by applying a few straightforward rules. . . . if the relief provided is a fine, it is remedial when it is paid to the complainant, and punitive when it is paid to the court, though a fine that would be payable to the court is also remedial when the Defendant can afford paying the fine by simply performing the affirmative act required by the courts order." Hicks ex. rel. Feiock v. Feiock, 108 S. Ct. 1423, 1429-30 (1988)(citation omitted).

V. THE COURT OF APPEALS DECISION ERRED USING STATE COURT CASE DECISION PERTAINING TO PRO SE PETITIONERS WHEREAS ISSUES INVOLVED CONFLICT WITH PRESENT CASE AND FEDERAL COURT CASE JUDGMENTS

A. Appellate Court erred in deciding a important federal question in a way that conflicts with decisions of this Court by using a State Court Case with unrelated issues..

The Kansas Petitioners are not asking for the special treatment as in Mangiaracina v. Gutierrez, 11 Kan. App. 2d 594, 730 P.2d 1109, 1111 (1986). The Kansas Petitioners were requesting to correct their response to Motion for Summary Judgment to conform to the evidence presented (R. IA, 189, 190, 191). Unlike the parties in Mangiaracina v. Gutierrez, 11 Kan. App. 2d 594, 730 P.2d 1109, 1111 (1986), who did not appear at the oral arguments, the Kansas Petitioners had attempted to answer the Summary Judgment and made their appearance for oral arguments. The Court abused its discretion in not allowing the Petitioners an opportunity to correct the answer in the proper manner.

The court erred in deciding an important issue that

has been decided in Federal court in several cases including Haines vs Kerner 404 US 519 (1972) and others mentioned in section V.

The Petitioners are doing the best of their ability to defend themselves. The Petitioners feel they done everything possible to check the legalities of the program, including with various state agencies, and felt satisfied as to not violating any statutes. The Petitioners answered the summary judgment with a Objection to Motion For Summary Judgment with a Memorandum in support of Objection attached (R. I, pg.144, 149). It was made to the best of their ability at that time which did not conform to the stringent standards that is required of lawyers. The Kansas Petitioners made their appearance for oral arguments and at that time the court acknowledged there was factual issues still in dispute (R. 3 pg 27).

The Kansas Petitioners were proceeding with discovery and requested production of documents (R. ONE-A pg. 177) that is substantial to discovery including a certified copy of each sale that the petitioners had made that would of been important in determining the number of sales, which to this day has not been answered. After the Memorandum Decision and Order was filed on June 25, 1993 the Kansas Petitioners requested to correct their response to Motion for Summary Judgment to conform to the stringent standards as drafted by lawers (R. IA, 190,).

> "Normally, pro se civil rights plaintiff must be allowed freely to amend defective pleadings". 42 U.S.C.A. 1983, Koff v. Butterworth 765 F.Supp. 716 (M.D.Fla. 1991). Holmes v. Goldin, 615 F.2d 83, 85 (2d Cir. 1980).

The Petitioners feel the Court abused its discretion in not allowing the Petitioners an opportunity to correct the answer in the proper manner.

> "The Supreme Court recognized in Estelle v. Gamble, 429 U.S. 97, S.Ct. 285, 50 L.Ed.2d. 251 (1976) that pro se complaints are to be held to less stringent standards than complaints drafted by lawyers".
>
> "The Supreme Court has held that where the complaint is not clear on this matter, the [course of proceedings] generally will indicate the type of liability imposed". Kentucky v. Graham, 473 U.S. 159, 167 n. 14, 105 S.Ct. 3099, 3106 n. 14 87 L.Ed.2d. 114 (1985)

The Petitioners are not asking for special treatment, only pray the court will consider the issues presented to make the determination necessary to serve justice. The Petitioners have and still do rely on Haines vs Kerner 404 US 519 (1972) and Freeman v. State, Dept. of Corrections 764 P.2d 445 (1988). Petitioners are answering in good faith and to the best of their ability.

VI. WHEREAS TWO DIFFERENT STATE AGENCIES INTERPRET THE TERM "INVESTMENT CONTRACT" AS TWO DIFFERENT MEANINGS WITH SEVERAL PERSONS OF COMMON INTELLIGENCE GUESSING AT IT'S MEANING AND DIFFERED TO IT'S APPLICATION

A. The Appellate Court erred in not recognizing the vagueness of the term "investment contract" when the record shows 3,486 persons of common intelligence with various state agencies and a stock broker that differed to it's application to that as the same of the Texas Security commissioner

The Petitioners submit that there was no basis on which the Court could render such a decision contrary to the evidence presented. The Petitioners contend that the K.S.A. 17-1252 (j) violates the due process of the Petitioners - a security to include the term "investment contract" K.S.A. 17-1252(j) is vague.

a. Where it is determined by the Memorandum Decision and Order that "Beginning in October of 1989, and continuing into November 1990, 3,486 Kansas residents purchased WPC membership packets and became members of WPC." (R. ONE-A pg. 183). The Petitioners submit that the 3,486 Kansas residents are of common intelligence who did not recognize the WPC program as an investment contract and required registration.
b. The Respondent has indicated that members did not know that they were violating the Security laws. (Brief of the Appellant exhibit B)
c. Knowledgeable personnel from various enforcement agencies did not recognize WPC as an investment contract. (Brief of Appellant Exhibit C,D,E). (Officer Michael Utz #33, Finney County Sheriff Department) etc...
d. The Kansas Attorney Generals Office did not recognize WPC as an investment contract. (Brief

of Appellant exhibit F).

e. A licensed securities Broker-dealer did not recognize WPC as an investment contract. (Brief of Appellant exhibit G).

The vagueness of the term "investment contract" in K.S.A. 17-1252(j) and how it applies to a person of common intelligence violates the due process of the Petitioners under U.S.C.A. Const.Amend. 5 & 14.

> "Due process requires that meaning of statute be sufficiently certain to provide individuals with adequate notice of law's requirements; potential defendant should not be forced at meaning of statute nor should statute be so devoid of standards as to invite arbitrary and discriminatory enforcement". U.S.C.A. Cond.Amend. 14. U.S. v. Rogers, 602 F.Supp. 1332. Colo (1985).

> "A violation of due process is a violation of Civil Liberties; Black's Law sixth edition: Personal, natural rights guaranteed and protected by Constitution....Constitutionally, they are restraints on government". Sowers v. Ohio Civil Rights Commission, 20 Ohio Misc. 115, 252 N.E.2d 463, 476 (1969).

> "A statute which either requires or forbids the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ to its application violates due process. U.S.C.A. Const. Amends. 5, 14, State v. Garrett, 684 P.2d 413, 235 Kan. 768

> "Due process requires that a statute which requires or forbids the doing of any act and subjects a person to penalties for failure to comply with the statute must not be so vague that a person of common intelligence must necessarily guess at its meaning." Capital Services v. Dahlinger Pontiac-Cadillac, Inc., 657 P.2d 36, 232 Kan. 419, appeal after remand 699 P.2d 549, 10 Kan. App. 2d 328

The application of the term "investment contract" to WPC is in violation of the Petitioners due process. The Texas Securities Commission includes the term "investment contract" under Title 19 Art. 581-4(a). The

Kansas Securities Commission includes the term "investment contract" under K.S.A. 17-1252(a). The Texas Security Commission investigated WPC and found not to be in any violation of Texas Securities Statutes (app. 11). The Kansas Securities Commission found WPC to be in violation of Kansas Security statutes. The State Statutes must provide explicit standards in harmony with Federal Statutes to avoid arbitrary and discriminatory enforcement. The Petitioners contend that for two state agencies to interpret the exact same definition as two different meanings does not give reasonable opportunity to know what is prohibited to act accordingly and avoid arbitrary and discriminatory enforcement which is a violation of due process.

> "Statute or regulation must be sufficiently specific in its proscriptions to comport with its principles of due process; to survive a "void for vagueness" attack, provisions must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly and must provide explicit standards so as to avoid its arbitrary and discriminatory enforcement". U.S.C.A. Const.Amends. 5,14. Hopkins v. Mayor & Council of city of Wilmington, 600 F.Supp. 542, Del. (1984)

The courts determination of an investment contract is so vague and broad that it violates the due process of the petitioners. " The law should be made as broad in its language as it is in its purpose." In re Uihlein's Will, 187 Wis. 101.

The Petitioners contend that the 3,486 Kansas residents were of common intelligence and the other personnel trying to apply the statutes were of trained, experienced, and of knowledgeable intelligence of the statutes and must, because of the vagueness of the investment contract, guess at its meaning and differ to its application. The Petitioners may not be held responsible for conduct which violated a rule that various agencies and trained personnel could not reasonably understand that their contemplated conduct was proscribed.

> "Void for vagueness doctrine means that a person may not be held responsible for conduct which

violates a rule where that person could not have reasonably understood that his contemplated conduct was proscribed". U.S.C.A. Const. Amend 14. Byrd v. City of Atlanta, 709 F.Supp. 1148. Ga. (1989).

The Petitioners have and still do rely on Haines vs Kerner 404 US 519 and Freeman v. State, Dept. of Corrections 764 P.2d 445 in that the Court is to look at the substance of the case and not the form.

CONCLUSION

For the foregoing reasons, the petition for a writ of CERTIORARI should be granted.

Respectfully submitted,

Benny W. Berry
C/O 1600 11th St.
Dodge City, Ks 67801
316-225-0645

Susan E. Berry
C/O 1600 11th St.
Dodge City, Ks 67801
316-225-0645

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
THIRD DIVISION

APPENDIX 1

filed KS district Court
Nov. 6, 1992

STATE ex rel. JAMES W. PARRISH,
Securities Commissioner of the
State of Kansas,

Plaintiff,

Case No. 92CV1427

vs.

MARY L. SCHERMERHORN,
SPENCER LEE SCHERMERHORN,
CHARLES W. BERRY, SHERRIE R. BERRY,
SUSAN E. BERRY, BENNY W. BERRY,
WILLIAM L. RACETTE, LARRY UTHE
LEANN K. RACETTE, DARREL L. BERRY,
ROGER J. WEBER, BARBARA SOZA,
DALE L. SHARPE, KARLA SHARPE,
KENNETH KESSEN, DAVID W. GROTHUSEN,
DEANNA G. GALLENTINE,
ARTHUR R. DUNSWORTH, and
DENISE MERKLEIN,

Defendants.

PETITION FOR PERMANENT INJUNCTION
AND FOR OTHER EQUITABLE RELIEF

Comes now the plaintiff, the State of Kansas ex rel. James W. Parrish, Securities Commissioner for the State of Kansas, and for its cause of action against the defendants, alleges that:

1. James W. Parish is the duly appointed Securities Commissioner of the State of Kansas, pursuant to K.S.A. 75-6301. Pursuant to K.S.A. 17-1266, the Commissioner is the proper party and is specifically authorized to bring an action to enjoin acts or practices and to enforce compliance with the Kansas Securities Act.

2. The defendants have engaged in violations of the Kansas Securities Act. Unless enjoined, they will continue to engage in such acts. Moreover, the defendants have received substantial sums of money from the unlawful sale of unregistered securities. Unless

ordered to disgorge their profits, they will have profited form illegal conduct and unjustly enriched themselves at the expense of others.

Defendants

3. Defendants Mary L. Schermerhorn and Spencer Lee Schermerhorn are Texas residents who reside at 146 Bentwood, Boerne, Texas 78006. They have submitted to the jurisdiction of the courts of Kansas by doing acts as set forth in K.S.A. 60-308 (b).

4. The remaining defendants are Kansas residents who reside at the following addresses:

a. Charles W. Berry and Sherrie R. Berry, 906 Elizabeth, Scott City, Kansas 67871.

b. Susan E. Berry and Benny W. Berry, 1600 11th Street, Dodge City, Kansas 67801.

c. William L. Racette, Rural Route 3, Box 174, Scott City, Kansas 67871.

d. Larry Uthe, 2310 North 8th, Garden City, Kansas 67846.

e. Leann K. Racette, 511 West 16th, Box 273, Larned, Kansas 67550.

f. Darrell L. Berry, Box 937, Lakin, Kansas 67860.

g. Roger J. Weber, Rural Route 3, Box 174A, Scott City, Kansas 67871.

h. Barbara Soza, 2417 Belmont Place, Garden City, Kansas 67846.

i. Dale L. Sharpe and Karla S. Sharpe, 904 Elizabeth, Scott City, Kansas 67871.

j. Kenneth Kessen, 2505 Webster, Dodge City, Kansas 67801.

k. David W. Grothusen, 1006 Glenn, Scott City, Kansas 67871.

l. Deanna G. Gallentine, 318 South State, Norton, Kansas 67654.

m. Arthur R. Dunsworth, Route 2, Box 94B, Spearville, Kansas 67876.

n. Denise Merklein, 8717 Hauser Drive, #H, Lenexa, Kansas 66215.

Common Allegations

5. World of Products Cooperative (WPC) is a multi-level, network marketing program, owned and operated by Mary V. and Spencer Lee Schermerhorn (the Schermerhorns). The WPC program was active in Kansas between October of 1989 and November of 1990. The

Kansas defendants all promoted WPC in Kansas and offered for sale memberships in WPC.

6. Individuals were recruited to join the WPC network by other members. A person became a member of WPC by purchasing a membership packet and paying $100.00. The $100.00 was paid in two $50.00 money orders and was sent tot he Schermerhorns in Texas. One $50.00 money order was made payable to WPC. THe other $50.00 money order was made payable to a "Chief Advisory Board member," a person ten levels up form the new member on a matrix maintained by WPC. The Schermerhorns kept the $50.00 money order made payable to WPC. After verifying that the second money order was properly made out, the Schermerhorns forward the $50.00 payment to the Chief Advisory Board member.

7. A new member of WPC was entitled to purchase items from the WPC catalog. Anew WPC member also had the right to recruit other members into the WPC program and to work toward becoming a Chief Advisory Board member. In order to become a member of the Advisory Board, new WPC members were required to recruit two other individuals or entities to join WPC membership packets for a price of $100.00.

8. When a member of WPC had recruited two other people to purchase membership packets and join WPC, the member was placed on the bottom rung of an Advisory Board list in the number ten position. When the two new members recruited by the person at the number ten level recruited more people to join WPC, a new level in the program was created. The new members would move into the number ten position of the Advisory Board list, and everyone on the list would move up one level. As more and more people joined the WPC program existing WPC members were gradually moved up through the Advisory Board list to the number one position, where they became Chief Advisory Board members. Chief Advisory Board members received the $50.00 money orders paid by new members ten generations downline. If every person in each level sold their two membership packets, there would be 1,024 members in the tenth generation downline, and the total payments form these people to the Chief Advisory Board member would total $51,200.00. All monies paid out to the Chief Advisory Board Members came directly from newly recruited members. A member whose name did not move through ten generations would not become a Chief Advisory Board Member and would not receive a return on the $100.00 investment.

9. A member who paid $100.00 to join WPC was to receive a$51,200.00 as a Chief Advisory Board member. The only requirement for a WPC member to be eligible to reach the Chief Advisory Board member level and to receive payments was to have sold two WPC membership packets.

10. The Ability to purchase products from the WPC catalog was not a significant factor in the decision to become a member of WPC. Very few product purchases were known to have been made by members. Participants in WPC indicated little or no interest in the products in the catalog; their incentive for participation in the WPC program was the prospect of becoming part of a multi-level organization and receiving substantial monetary profits from later participants in the WPC program. The business enterprise being promoted was the right to recruit others into the program. The economic substance of the WPC program was a "pyramid money game" and a Ponzi scheme.

11. A WPC member did not have any role in the management or organization of WPC. The successful promotion and proliferation of the WPC network program involved the commitment of substantial managerial and entrepreneurial resources by the Schremerhorns. The Schermerhorns' office in Texas compiled the names of the members and kept track of the downline positions on Advisory Board lists. The Schermerhorns handled all of the financial accounting and record keeping for the organization and new the source of all promotional materials. The Schermerhorns were responsible for collecting membership fees and for the distribution of payments to Chief Advisory Board members.

First Cause of Action

12. The allegation of paragraphs 1 trough 11 are realleged and incorporated by reference.

13. The Kansas defendants solicited and encouraged Kansas residents to purchase membership packets in WPC and to become new members of WPC. They promoted the WPC program in Kansas through contact with individuals, meetings held in private homes and/or group meetings. These contacts and meetings involved emotionally charged presentations where prospective participants were led to expect substantial returns from a $100.00 investment. THe promoters, on occasion, would open and display money orders that had been received,

demonstrating the economic rewards that could be expected form the WPC program.

14. The Kansas defendants are WPC members who attained the Chief Advisory Board member level and received the $50.00 payments from new members entering the WPC program. These defendants offered and sold WPC memberships in Kansas.

15. The Schermerhorns solicited and encouraged Kansas residents to purchase memberships in WPC. The efforts of the Schermerhorns were essential to the proliferation of the WPC multi-level program in Kansas. The Schermerhorns controlled WPC, and sold memberships in WPC to the Kansas residents recruited by the Kansas defendants.

16. The WPC memberships were securities as defined inK.S.A. 17-1252(j). The WPC memberships constituted investment contracts -- the participants invested money in a common enterprise with the expectation of receiving profits from the significant managerial efforts of others. These securities were not registered under the Kansas Securities Act, nor were they exempt from such registration.

17. All defendants offered and sold unregistered securities in the State of Kansas, in violation of K.S.A. 17-1255.

Second Cause of Action

18. The allegation in paragraph 1 through 17 are realleged and incorporated by reference.

19. At the time the WPC memberships were offered and sold in Kansas, the defendants were not registered with the Kansas Securities Commissioner as broker-dealers or as agents. Their offer and sale of securities in Kansas without being registered as broker-dealers or as agents violated K.S.A. 17-1254.

Third Cause of Action

20. The allegation in paragraph 1 through 19 are realleged and incorporated by reference.

21. The untrue statements of material fact include but are not limited to the following:

a. The representation that the WPC program was legal in Kansas.

b. The representation that the Kansas Attorney General had approved of the WPC

program.

23. The omissions of material fact include but are not limited to the following:

a. The failure to disclose that the WPC memberships offered in Kansas were securities and that the offer, sale and transfer of securities is regulated.

b. The failure to disclose that the WPC program being offered was unlawful under the Kansas Securities Act.

c. The failure to disclose that both in theory and importance all multi-level, pyramid or matrix money schemes are doomed to fail. The number of new investors required to support such programs increases exponentially over time. The market for investors in any given population ultimately becomes saturated and collapses, with the result that later participants are not able to find a sufficient number of new members to keep the program active.

d. The failure to disclose that multi-level, pyramid or matrix programs create no new economic goods or services, and that, therefore, any profits received by promoters or participants must necessarily be derived from losses incurred by other participants.

e. The failure to disclose that the WPC program had been challenged by the Texas Attorney General and that the Schermerhorns were involved in legal proceedings in Texas concerning the promotion and marketing of WPC memberships.

Prayer for Relief

Wherefore, the plaintiff respectfully prays that the Court grant the following relief:

1. Issue a Permanent Injunction restraining and enjoining the defendants and their agents, affiliated, employees and contractors from directly or indirectly:

a. Offering or selling any securities within the State of Kansas or directly or indirectly aiding and assisting in the same or attempting to do the same unless and until such securities have been registered for offer and sale pursuant to the provisions of the Kansas Securities Act, or unless and until such securities are specifically exempt from the

registration requirements of the the Kansas Securities Act.

b. Transacting business in Kansas as broker-dealers or agents unless and until the defendants are properly registered as broker-dealers or agents pursuant to the provisions of the Kansas Securities Act or unless and until the defendants are exempt from such registration.

c. Engaging in any unlawful acts in connection with the offer, sale or purchase of securities, and specifically from making any untrue statements of material fact or omitting to state a martial fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading.

2. Issue an Order requiring the defendants to disgorge any and all profits made as a result of their involvement in the WPC program, and to pay all profits so obtained into the Treasury of the Court. A list of the money received by the defendants, according to the WPC records, is attached as Exhibit A;

3. Issue an Order appointing a Receiver to collect and take possession of the profits ordered disgorged by the defendants for disposition as the Court, in its discretion, may Order; and

4. Issue an Order requiring the defendants to produce for inspection by the Receiver such books and records as are necessary to obtain an accounting of the amount, source and disposition of any funds received as a result of the defendants' participation it the WPC program.

Respectfully submitted,

"s/ Caroline M. Ong"

Caroline M. Ong, #13592
Associate General Counsel
Office of the Securities
Commissioner of Kansas
618 S. Kansas, 2nd Floor
Topeka, KS 66603
(913) 296-5215

EXHIBIT A

Name	Amount
Mary L. Schermerhorn Spencer Lee Schermerhorn	$174,300.00
Charles W. Berry Sherrie R. Berry	$ 35,250.00
Susan E. Berry Benny W. Berry	$ 29,354.74
William L. Racette	$ 7,200.00
Larry Uthe	$ 700.00
Leann K. Racette	$ 1,750.00
Darrell L. Berry	$ 22,550.00
Roger J. Weber	$ 3,450.00
Barbara Soza	$ 4,000.00
Dale L. Sharpe Karla S. Sharpe	$ 4,100.00
Kenneth Kessen	$ 1,250.00
David W. Grothusen	$ 10,600.00
Deanna G. Gallentine	$ 2,900.00
Arthur R. Dunsworth	$ 500.00
Denise Merklein	$ 7,350.00

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
THIRD DIVISION APPENDIX 2

filed KS district Court
March 15, 1993

STATE ex rel. JAMES W. PARRISH,
Securities Commissioner of the
State of Kansas,

Plaintiff,

Case No. 92CV1427

vs.

MARY L. SCHERMERHORN,
SPENCER LEE SCHERMERHORN,
CHARLES W. BERRY, SHERRIE R. BERRY,
SUSAN E. BERRY, BENNY W. BERRY,
WILLIAM L. RACETTE, LARRY UTHE
LEANN K. RACETTE, DARREL L. BERRY,
ROGER J. WEBER, BARBARA SOZA,
DALE L. SHARPE, KARLA SHARPE,
KENNETH KESSEN, DAVID W. GROTHUSEN,
DEANNA G. GALLENTINE,
ARTHUR R. DUNSWORTH, and
DENISE MERKLEIN,
Defendants.

MEMORANDUM DECISION AND ORDER

The various defendants have filed motions to dismiss, generally, on the grounds this Court lacks jurisdiction, the venue is improper and the plaintiff has failed to state a claim.

The defendants argue there is no jurisdiction because the subject of this action is pending in case number 92 CV 907. That case is an appeal of an administrative decision. The scope of issue and the relief sought are not duplicitous. The Court, therefore, has subject matter jurisdiction. The administrative action does not divest the Court of jurisdiction. Further, as to personal jurisdiction, the power of this Court derives from Article 3 of the Kansas Constitution and under the statues of Kansas. Sufficient allegations to support this Court's jurisdiction are contained in the petition.

Upon review of the petition, the Court finds that the plaintiff has stated claims upon which relief can be granted. The fact defendants are abiding by a cease

and desist order issued by the Securities Commission does not mean that a claim for relief is not stated. As to the statute of limitations question, the petition alleges the complained of acts continued until November of 1990. This action was filed in November 1992. Hence, based upon the pleading, the matter is within the applicable statute of limitations. Under K.S.A. 60-212, the motion to dismiss is to be considered upon the pleadings which allege the action is timely filed.

As to the issue of venue, K.S.A. 60-603 defines the proper venue for actions against residents of the state and provides for venue in the county in which the cause of action arose. The thrust of this suit arises from the defendants' failure to register securities and register as a securities brokers. The actions arise in Shawnee County, Kansas.

The Court is unable to find a basis for these or the other claims of the defendants. Hence, the following motions are denied:

Motion by Darrel L. Berry to Dismiss the Petition for Permanent Injunction and for Other Equitable Relief, Counter Complaint filed;

Motion by Sherrie Berry, Charles Berry, Benny Berry, Susan Berry and William Racette for Motion to Dismiss and Objection to Petition for Permanent Injunction;

Motion by Leann K. Racette to Dismiss the Petition for Permanent Injunction and for Other Equitable Relief, Counter Complaint filed;

Motion by Deanna Gallentine to Dismiss the Petition for Permanent Injunction and for Other Equitable Relief, Counter Complaint filed;

Motion by Roger J. Weber to Dismiss the Petition for Permanent Injunction and for Other Equitable Relief, Counter Complaint filed;

Motion by Barbara Soza to Dismiss the Petition for Permanent Injunction and for Other Equitable Relief and/or Counterclaim.

Further, the Court finds that the defendants have not stated a counterclaim. Any claims as to the frivolous and malicious nature of this suit are premature and are not properly stated in a counterclaim. See K.S.A. 60-211; Gross v. Reid, 242 Kan. 782, 751 P.2d 131 (1988).

IT IS SO ORDERED.

"S/ MARLA J. LUCKERT"

Marla J. Luckert, District Judge

COPIES TO:

Caroline Ong
Charles Berry
Sherrie Berry
Susan Berry
Benny Berry
William Racette
Leann Racette
Darrel Berry
Roger J. Weber
Barbara Soza
Deanna Gallentine
Denise Merklein
Robert North

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
THIRD DIVISION APENDIX 3

filed KS district Court
June 25, 1993

STATE ex rel. JAMES W. PARRISH,
Securities Commissioner of the
State of Kansas,

Plaintiff,

Case No. 92CV1427

vs.

MARY L. SCHERMERHORN,
SPENCER LEE SCHERMERHORN,
CHARLES W. BERRY, SHERRIE R. BERRY,
SUSAN E. BERRY, BENNY W. BERRY,
WILLIAM L. RACETTE, LARRY UTHE
LEANN K. RACETTE, DARREL L. BERRY,
ROGER J. WEBER, BARBARA SOZA,
DALE L. SHARPE, KARLA SHARPE,
KENNETH KESSEN, DAVID W. GROTHUSEN,
DEANNA G. GALLENTINE,
ARTHUR R. DUNSWORTH, and
DENISE MERKLEIN,

Defendants.

MEMORANDUM DECISION AND ORDER

The Plaintiff has filed a motion for summary judgment in this case against all Defendants who have not been dismissed or judgment has been taken. Journal entries regarding the dismissal of Dale L. Sharpe, Karla S. Sharpe, Larry Uthe, Kenneth Kessen, David W. Grothusen and Arthur R. Dunsworth have been entered.

A Defendant responding to the motion for summary judgment complied with Rule 141. Supreme Court Rule 141 requires the moving party to set forth concisely numbered paragraphs the uncontroverted contentions of fact upon which the motion for summary judgment is based. Citations to the record must support the statements. Failure to comply means that the motion cannot be decided finally submitted. McCullough v. Bethany Medical Center, 247 Kan. 730, 736, 803 P.2d 1038 (1991). In replying, the opposing party must respond in corresponding numbered paragraphs

to each of the movant's factual statements. If the opposing party fails to comply with the rule's requirements, "the opposing party shall be deemed to have admitted the uncontroverted contentions of fact set forth in the memorandum or brief of moving party". As stated by the Supreme Court, "Rule 111 is not just fluff - it means what it says and serves a necessary purpose". Id. at 736. Consequently, the opposing parties failure to comply with the rule in this case means that the facts submitted by movant are uncontroverted.

Hence, the matter is before the Court on uncontroverted facts. These facts are supported by the affidavit of Gary D. Fulton, Special Investigator for the Plaintiff.

FINDINGS OF FACT

1. In 1989 and 1990, World of Products Cooperative (WPC) was a multi-level marketing program operated out of Bracketville, Texas by Mary and Spencer Lee Schermerhorn.

2. Individuals were recruited to join the WPC network by other members. A person became a member of WPC by purchasing a membership packet and paying $100.00. The $100.00 was paid in $50.00 money orders and was sent to the Schermerhorns in Texas. One $50.00 money order was made payable to WPC. The other $50.00 money order was made payable to a "Chief Advisory Board Member", a person ten levels up from the new member on a matrix maintained by WPC.

3. The $50.00 money order made payable to WPC was kept by the Schermerhorns and WPC. The second $50.00 money order was forwarded by the Schermerhorns to the designated Chief Advisory Board Member.

5. When a member of WPC had recruited two other people to purchase membership packets and join WPC, the member was placed on the bottom rung of an advisory Board list in the number ten position. When the two new members recruited by the person at the number ten level recruited more people to join WPC, a new level in the program was created. The new members would be placed at the bottom of the list, and everyone would move up one level higher on the Advisory Board list. Existing WPC members were gradually moved up through the Advisory Board list as more and more people joined the WPC program. When there were ten levels under the existing WPC member, that member reached the number one position on the Advisory Board list and became a Chief Advisory Board Member.

6. Chief Advisory Board Members received the $50.00 money orders paid by new members ten generations downline. If every person in each level sold their two membership packets, there would be 1,024 members in the tenth generation downline, and the total payments from these people to the Chief Advisory Board Member would total $51,200.00. The money paid out to the Chief Advisory Board Members came directly from newly recruited members. A member who did not have ten levels in his downline would not become a Chief Advisory Board member.

7. The only requirement for a WPC member to be eligible to reach the Chief Advisory Board Member level and to receive payments was to have sold two WPC membership packets. A member who had paid $100.00 to join WPC and had become a Chief Advisory Board Member was to receive $51,200.00 if all the levels in his downline were filled.

8. The primary incentive for participation in the WPC program was the prospect of making a substantial amount of money from an initial investment of $100.00. While members had the ability to purchase products from the WPC catalog, very few product purchases were made by members.

9. Members of WPC did not have any role in the management or organization of WPC. The WPC program and memberships were created and controlled by the Schermerhorns. The Schermerhorns' office in Texas

compiled the names of the members and kept track of the downline positions on Advisory Board lists. The Schermerhorns handled all of the financial accounting and record keeping for the organization. The Schermerhorns provided WPC application forms, membership packets and promotional materials to Kansas participants. The Schermerhorns collected membership fees and distributed payments to Chief Advisory Board Members.

10. Beginning in October of 1989, and continuing into November of 1990, 3,486 Kansas residents purchased WPC membership packets and became members of WPC.

11. The Schermerhorns received from these members the $50.00 money orders which were made payable WPC.

12. Charles W. Berry, Sherrie R. Berry, Susan E. Berry, Benny W. Berry, William L. Racette, Leann K. Racette, Darrel L. Berry, Roger J. Weber, Barbara Soza, Deanna G. Gallentine and Denise Merklein (the Kansas Defendants) were all members of WPC. In 1989 and 1990, the Kansas Defendants promoted WPC in Kansas and sold WPC membership packets to those in their downlines.

13. The Schermerhorns directly assisted Kansas residents in promoting and selling WPC memberships. The Schermerhorns provided advice and instruction on how to offer and sell the WPC program to potential members. When members of WPC in Kansas recruited new members, the Schermerhorns processed the membership applications and issued the membership packets to the new members.

14. The Kansas Defendants all attained the Chief Advisory Board Member level and received the $50.00 payments from new members entering the WPC program.

15. The WPC memberships were not registered as securities in Kansas.

16. The Defendants were not registered in Kansas as broker-dealers or agents at the time they sold WPC membership packets in Kansas.

CONCLUSIONS OF LAW

Plaintiff seek to enjoin the offer and sale of WPC membership packets. Plaintiff argued these packets are securities as defined in K.S.A. 17-1252 (j). The packets are not registered as securities and the Defendants are not registered as security broker-dealers or agents. Hence, if the membership packets are securities, the Defendants have violated the Kansas Securities Act, specifically K.S.A. 17-1254 and 17-1255. Further, Plaintiff argues the defendants have violated the Act by making untrue statements of material fact and omitting material facts when making an offer to sell securities.

Plaintiff argues the WPC membership packets were securities as defined in K.S.A. 17-1252(j), because the packets were an "investment contract". As summarized by the Kansas Supreme Court, the test to be applied in determining whether there is an investment contract is whether:

> [T]he contractual arrangement involves an investment of money in a common enterprise with the profits to come from the efforts of others. This test is to be applied in light of the economic realities of the particular contractual arrangement, rather than accepting the terminology employed by the parties in the investment contract.
>
> Thus, the Colby test requires four essential elements:
>
> (1) An investment of money
> (2) A common enterprise
> (3) An expectation of future profits
> (4) From the efforts of others.

Activator Supply Co. v. Wurth, 239 Kan. at 617.

These elements are met in this case. The Defendants invested $100.00. This money was used to fund the WPC enterprise and to pay off a Chief Advisory Board Member ten levels up on an Advisory Board list. In reality, what the new WPC member sought and received in return for this investment was the ability to form a downline on the WPC matrix and to have the potential of becoming a Chief Advisory Board Member and receiving payments from new members. The new WPC member was subject to the risk of financial loss as there was no

guarantee that this member would reach the Chief Advisory Board level or receive any payments. If the downline of the WPC member did not reach ten levels, that member would not be entitled to the $50.00 money orders from new members, and would have lost the benefit of the $100.00 investment.

Hence, Defendants' made an investment of money. In Activator Supply Co. v. Wurth, the Court reviewed several cases involving similar investments and determined this element had been met. Id. at 618, 722 P.2d 1087.

The "common enterprise" element is also met. In Activator Supply Co., the court stated:

> A major case defining "common enterprises" is Securities Exch. Com. v. Koscot Inter., Inc., 497 F.2d 475 (5th Cir. 1974), which relied on Securities Exchange Com'n b. Glenn W. Turner Ent., Inc., 474 F.2d 476 (9th Cir. 1973), and held that a pyramid selling scheme involving sales of distributorships satisfied the "common enterprise" element of the definition of an investment contract. The court in Koscot defined a common enterprise as one in which the "fortunes of the investor are interwoven with and dependent upon the efforts and success of those seeking the investment or of third parties." 497 F.2d at 478. Further, the court stated that the fact that the investor's return is independent of that of other investors in the scheme (sometimes referred to as horizontal commonality) is not decisive. Rather, the requisite commonality is evidenced by the fact that the fortunes of all investors are inextricably tied to the efficacy the promoters. 497 F2d at 479. This is referred to as vertical commonality.

Activator Supply Co. v. Wurth, 239 Kan. at 618.

Here, the fortunes of the Defendants were dependent upon the central management of WPC. WPC, in turn, was dependent upon the constant promotion of its program by members and the receipt of payments from new members. For a member to make the full profit, ten levels of membership downlines from the purchase had to be

filled.

These purchasers expected a return in excess of $50,000 for the initial investment of $100.00 and the commitment recruitment of two other members. Hence, the third element of the test is met.

In the final element of the test, the profits must derive from the efforts of others. In a related case where some of the Defendants have appealed from the administrative decision of the Plaintiff, those Defendants argued the profits had to derive solely from the efforts of others.

In Activator Supply Co. v. Furth, 239 Kan. 610, 722 P.2d 108 (1986), the Court adopted as part of the definition of an investment contract that the profits come from the efforts of others but rejected the test that the profits derive solely from efforts of others. The court noted: "To hold otherwise would make it easy to evade the existence of an investment contract by adding a requirement in the contract that the buyer contributed a modicum of effort." Id. at 620. In this case, the Defendants did make some effort. However, the profits for the individual Defendants depended upon the continued promotional efforts of other members and upon the organization and management skills of the Schermerhorns. The WPC multilevel program, from which Defendants' profits derived, could not be sustained by Defendants; efforts alone but required the significant effort of the Schermerhorns, the organizational framework of WPC and the efforts of the other investors.

Hence, the Court finds the memberships were an investment contract and, therefore, a security. By not registering the security, Defendants violated K.S.A. 17-1254 which requires registration of these offering or effecting the sale of a security. Under K.S.A. 17-1266, the Plaintiff is entitled to a permanent injunction, to an order allowing restitution and to the appointment of a receiver.

The Plaintiff is directed to submit to the Court for approval an order of injunction, an order appointing a receiver and an order allowing restitution.

Some Defendants sought reconsideration of the Court's order of March 14, 1993. The Court finds no basis to alter the decision. The motion is denied.

IT IS SO ORDERED.

"s/ MARLA J. LUCKERT"
Marla J. Luckert, District Judge

COPIES TO:
Caroline Ong
Charles Berry
Sherrie Berry
Susan Berry
Benny Berry
William Racette
Leann Racette
Darrel Berry
Roger J. Weber
Barbara Soza
Deanna Gallentine
Denise Merklein

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
THIRD DIVISION

filed KS district Court
Aug 20, 1993

STATE ex rel. JAMES W. PARRISH,
Securities Commissioner of the
State of Kansas,

APPENDIX 4A

Plaintiff,

Case No. 92CV1427

vs.

MARY L. SCHERMERHORN,
SPENCER LEE SCHERMERHORN,
CHARLES W. BERRY, SHERRIE R. BERRY,
SUSAN E. BERRY, BENNY W. BERRY,
WILLIAM L. RACETTE, LARRY UTHE
LEANN K. RACETTE, DARREL L. BERRY,
ROGER J. WEBER, BARBARA SOZA,
DALE L. SHARPE, KARLA SHARPE,
KENNETH KESSEN, DAVID W. GROTHUSEN,
DEANNA G. GALLENTINE,
ARTHUR R. DUNSWORTH, and
DENISE MERKLEIN,

Defendants.

ORDER OF PERMANENT INJUNCTION

Whereas the Court, in its Order of June 25, 1993, granted judgment in favor of the plaintiff in this action and found that the plaintiff is entitled to the relief requested;

IT IS, THEREFORE, ORDERED BY THE COURT that Defendants Mary Schermerhorn, Spencer Lee Schermerhorn, Charles W. Berry, Sherrie R. Berry, Susan E. Berry, Benny W. Berry, William L. Racette, Leann K. Racette, Darrel L. Berry, Roger J. Weber, Barbara Soza, Dale L. Sharpe, Karla Sharpe, Deanna G. Gallentine, and Denise Merklein, and their agents, affiliates, employees, and contractors, are hereby restrained and enjoined from engaging in any conduct, acts or practices which constitute or will constitute a violation of the Kansas Securities Act, K.S.A. 17-1252, et seq., and are specifically restrained and enjoined from:

a. offering or selling any securities

within the State of Kansas or directly or indirectly aiding and assisting in the same or attempting to do the same unless and until such securities have been registered for offer and sale pursuant to the provisions of the Kansas Securities Act, or unless and until such securities are specially exempt from the registration requirements of the Kansas Securities Act; and

b. transacting business in Kansas as broker-dealers or agents unless and until the defendants are properly registered as broker-dealers or agents pursuant to the provisions of the Kansas Securities Act or unless and until the defendants are specifically exempt from such registration; and

c. engaging in any unlawful acts in connection with the offer, sale, or purchase of securities.

IT IS SO ORDERED.

Entered this 13th day of August, 1993, in Topeka, Kansas.

"S/ Marla J. Luckert"
Marla J. Luckert
District Judge

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
THIRD DIVISION

APPENDIX 4 B

filed by clerk KS district
Aug 20 1993

STATE ex rel. JAMES W. PARRISH,
Securities Commissioner of the
State of Kansas,

Plaintiff,

Case No. 92CV1427

vs.

MARY L. SCHERMERHORN,
SPENCER LEE SCHERMERHORN,
CHARLES W. BERRY, SHERRIE R. BERRY,
SUSAN E. BERRY, BENNY W. BERRY,
WILLIAM L. RACETTE, LARRY UTHE
LEANN K. RACETTE, DARREL L. BERRY,
ROGER J. WEBER, BARBARA SOZA,
DALE L. SHARPE, KARLA SHARPE,
KENNETH KESSEN, DAVID W. GROTHUSEN,
DEANNA G. GALLENTINE,
ARTHUR R. DUNSWORTH, and
DENISE MERKLEIN,

Defendants.

MEMORANDUM-DECISION AND ORDER

Various Defendants have filed motions for reconsideration on the basis that, as parties pro se, they should not be held to the same standards as trained attorneys.

In Mangiaracina v. Gutierrez, 11 Kan. App. 2d 594, 595, 730 P.2d 1109 (1986), the Kansas Court of Appeals rejected the argument now being made by the defendants:

> The rule that governs this case is simple. A pro se litigant in a civil case is required to follow the same rules of procedure and evidence which are binding upon a litigant who is represented by counsel. Our legal system cannot function on any basis other than equal treatment of all litigants. To have different rules for different classes of litigants is untenable. A

> party in civil litigation cannot expect the trial judge or an attorney for the other party to advise him or her of the law or court rules, or to see that his or case is properly presented to the court. A pro se litigant in a civil case cannot be given either an advantage or a disadvantage solely because of proceeding pro se. Thus, the trial court did not err in failing to consider the fact that defendants were pro se at the time they were served with the motion for summary judgment.

Id.

The Defendants' motions to reconsider are denied. IT IS SO ORDERED.

"s/ MARLA L. LUCKERT "
Marla J. Luckert, District Judge

COPIES TO:

Caroline Ong
Charles Berry
Sherrie Berry
Susan Berry
Benny Berry
William Racette
Darrel Berry
Roger J. Weber
Barbara Soza
Deanna Gallentine
Denise Merklein

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
THIRD DIVISION

filed KS district Court
Aug 20, 1993

STATE ex rel. JAMES W. PARRISH,
Securities Commissioner of the
State of Kansas,

APPENDIX 4 c

Plaintiff,

Case No. 92CV1427

vs.

MARY L. SCHERMERHORN,
SPENCER LEE SCHERMERHORN,
CHARLES W. BERRY, SHERRIE R. BERRY,
SUSAN E. BERRY, BENNY W. BERRY,
WILLIAM L. RACETTE, LARRY UTHE
LEANN K. RACETTE, DARREL L. BERRY,
ROGER J. WEBER, BARBARA SOZA,
DALE L. SHARPE, KARLA SHARPE,
KENNETH KESSEN, DAVID W. GROTHUSEN,
DEANNA G. GALLENTINE,
ARTHUR R. DUNSWORTH, and
DENISE MERKLEIN,

Defendants.

ORDER APPOINTING RECEIVER

The above entitled matter comes before the court for review. Having examined the files and records in this matter, the court finds:

1. That in its Order of June 25, 1993, the Court found that certain defendants had violated K.S.A. 17-1254 and 17-1255, and that these defendants had derived monetary gain from their illegal activities. The Court found that the plaintiff was entitled to the relief requested, which included orders for disgorgement of profits and for the appointment of a Receiver.

2. That there exists $292,205.54 in uncollected, outstanding judgments against certain defendants in this action.

3. That funds paid in satisfaction of the outstanding judgments are to be paid into the Treasury of the Clerk of the Court to be disposed of as directed

by the Court.

4. That the plaintiff has no direct entitlement to the funds described above.

5. That the appointment of a Receiver is required and necessary to collect the funds ordered disgorged and to most efficiently and effectively bring about an orderly conclusion to this proceeding.

IT IS, THEREFORE, ORDERED that Joseph P. Huerter, of Topeka, Kansas, should be and is hereby appointed as Receiver to take possession and to collect, keep, and preserve funds paid in satisfaction of the outstanding judgments against the defendants.

IT IS FURTHER ORDERED that the Receiver is hereby authorized to take all such further action and exercise powers necessary or convenient to carry out this Order, which shall include, but not be limited to, the power to institute any and all necessary legal proceedings to enforce execution on the outstanding judgments against the defendants, and execute and file the appropriate legal documents and releases indicating that outstanding judgments have been satisfied. The Receiver is hereby authorized to defend and initiate such equitable or legal actions or proceedings in this or in foreign jurisdictions as the Receiver may deem appropriate to seek enforcement of the judgments or to carry out his duties as Receiver. The Receiver is authorized to employ attorneys and other professionals as he may deem necessary to accomplish his duties. In the performance of these duties, the Receiver and his agents are deemed to be a public officer acting in an official capacity on behalf of this Court and the State of Kansas, and shall have no personal liability for or arising out of their acts or omissions performed in good faith in connection with the services performed pursuant to this or related Orders.

IT IS SO ORDERED that the amounts collected by the Receiver in satisfaction of the outstanding judgments be paid into the Treasury of the Court. All costs, fees and expenses of the Receiver, and all other expenses incurred in connection with his duties, shall be paid from the funds collected and paid in satisfaction of the outstanding judgments.

IT IS FURTHER ORDERED that the Receiver is hereby authorized to act in all ways and exercise all powers necessary or convenient for the purpose of carrying out this Order until discharged by the Court, and that Joseph P. Huerter is hereby directed to file a fidelity

bond in the amount of $10,000.00 to be provided by corporate surety guaranteeing performance of the duties and obligations of his office, such bond being subject to the approval of the Court.

IT IS FURTHER ORDERED that this appointment shall not be effective, nor shall the Receiver exercise any powers or perform any duties until he has filed an oath and an approved fidelity bond.

IT IS SO ORDERED.

Entered this 13th day of August, 1993, at Topeka, Kansas.

"s/ MARLA J. LUCKERT "

Marla J. Luckert, District Judge

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
THIRD DIVISION

filed KS District Court
Aug 20 1993

APPENDIX 40

STATE ex rel. JAMES W. PARRISH,
Securities Commissioner of the
State of Kansas,

Plaintiff,

Case No. 92CV1427

vs.

MARY L. SCHERMERHORN,
SPENCER LEE SCHERMERHORN,
CHARLES W. BERRY, SHERRIE R. BERRY,
SUSAN E. BERRY, BENNY W. BERRY,
WILLIAM L. RACETTE, LARRY UTHE
LEANN K. RACETTE, DARREL L. BERRY,
ROGER J. WEBER, BARBARA SOZA,
DALE L. SHARPE, KARLA SHARPE,
KENNETH KESSEN, DAVID W. GROTHUSEN,
DEANNA G. GALLENTINE,
ARTHUR R. DUNSWORTH, and
DENISE MERKLEIN,

Defendants.

ORDER

Whereas the Court, in its Order of June 25, 1993, granted judgment in favor of the plaintiff in this action and found that the plaintiff is entitled to the relief requested;

IT IS, THEREFORE, ORDERED BY THE COURT that judgment in favor of the plaintiff in the following amounts is entered, and that the following amounts are to be disgorged by the defendants and paid into the Treasury of the Clerk of the Shawnee County District Court for disposition as the Court, in its discretion, may order:

Name	Amount
Mary V. Schermerhorn Spencer Lee Schermerhorn	$174,300.00
Charles W. Berry	$ 35,250.80

Sherrie R. Berry	
Susan E. Berry Benny W. Berry	$ 29,354.74
William L. Racette	$ 7,200.00
Leann K. Racette	$ 1,750.00
Darrel L. Berry	$ 22,550.00
Roger J. Weber	$ 3,450.00
Barbara Soza	$ 4,000.00
Dale L. Sharpe Karla S. Sharpe	$ 4,100.00
Deanna G. Gallentine	$ 2,900.00
Denise Merklein	$ 7,350.00

IT IS FURTHER ORDERED that the Clerk of the District Court maintain all such funds received in a separate interest bearing account until further order of the Court.

IT IS FURTHER ORDERED that the above defendants produce for inspection and copying by the plaintiff, or by a Receiver appointed in connection with this case, such books and records as are necessary to obtain an accounting of the amount, source, and disposition of the funds received as a result of their participation in the WPC program.

IT IS SO ORDERED.

Entered this 13th day of August, 1992, in Topeka, Kansas.

"S/ Marla J. Luckert"

Marla J. Luckert, District Judge

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
THIRD DIVISION

APPENDIX 5

filed in District Court
Jan 7, 1994

STATE ex rel. JAMES W. PARRISH,
Securities Commissioner of the
State of Kansas,

Plaintiff,

Case No. 92CV1427

vs.

MARY L. SCHERMERHORN,
SPENCER LEE SCHERMERHORN,
CHARLES W. BERRY, SHERRIE R. BERRY,
SUSAN E. BERRY, BENNY W. BERRY,
WILLIAM L. RACETTE, LARRY UTHE
LEANN K. RACETTE, DARREL L. BERRY,
ROGER J. WEBER, BARBARA SOZA,
DALE L. SHARPE, KARLA SHARPE,
KENNETH KESSEN, DAVID W. GROTHUSEN,
DEANNA G. GALLENTINE,
ARTHUR R. DUNSWORTH, and
DENISE MERKLEIN,

Defendants.

MEMORANDUM DECISION AND ORDER

Several motions filed by a defendant or defendants are pending: (1) a motion for relief from judgment or order and motion for new trial; (2) an amended motion to set aside judgment and vacate order; and (3) a response to motion. Each of these motions seek to modify or vacate the judgment entered in this case.

The Court finds that the motions are untimely. K.S.A. 60-259. The Court further finds that there is no merit to the matters raised in the motions and that there are no grounds for any granting relief from the judgment and order. In an order filed on August 20, 1993, the Court ruled upon the issues raised in the motions. That ruling and the order granting judgment adequately address the issues raised by the motions and serve as the findings of fact and conclusions of law necessary to support his order.

Some of the motions purport to be filed on behalf

of defendants Sherrie Berry, Charles Berry, Benny Berry, Susan Berry, William Racette, Leann Racette, Darrel Berry, Roger Weber, Barbara Soza, Deanna Gallentine, and Denise Merklein; however, the only signature is that of defendant Benny W. Berry. It is a well-settled principle of law that a party to a civil action may appear either pro se or through a licensed attorney. Hickman v. Frerking, 4 Kan. App. 2d 590, 609 P.2d 682, 685 (1980). Defendant Benny W. Berry is not an attorney and cannot represent the other defendants in this action. The Court finds that the only defendant to have filed those motions signed only by Benny W. Berry is Benny W. Berry.

The motions are denied.

IT IS SO ORDERED.

"s/ MARLA J. LUCKERT"
Marla J. Luckert, District Judge

COPIES TO:
Caroline Ong
Charles Berry
Sherrie Berry
Susan Berry
Benny Berry
William Racette
Darrel Berry
Roger J. WEber
Barbara Soza
Deanna Gallentine
Denise Merklein

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
THIRD DIVISION

filed by clerk KS Dist Court
Feb 14, 1994

STATE ex rel. JAMES W. PARRISH,
Securities Commissioner of the
State of Kansas,

APPENDIX 6

Plaintiff,

Case No. 92CV1427

vs.

MARY L. SCHERMERHORN,
SPENCER LEE SCHERMERHORN,
CHARLES W. BERRY, SHERRIE R. BERRY,
SUSAN E. BERRY, BENNY W. BERRY,
WILLIAM L. RACETTE, LARRY UTHE
LEANN K. RACETTE, DARREL L. BERRY,
ROGER J. WEBER, BARBARA SOZA,
DALE L. SHARPE, KARLA SHARPE,
KENNETH KESSEN, DAVID W. GROTHUSEN,
DEANNA G. GALLENTINE,
ARTHUR R. DUNSWORTH, and
DENISE MERKLEIN,

Defendants.

MEMORANDUM DECISION AND ORDER

Motions to proceed on appeal in forma pauperis have been filed by Benny W. Berry, Susan E. Berry, William L. Racette, Barbara Soza, Roger J. Weber, Denise Merklein, Darrel L. Berry, Charles W. Berry and Sherrie R. Berry. A motion for stay has also be filed. All motions are denied.

The Court, in prior rulings, had advised the movants that to affect a stay, a bond must be posted. That has not occurred. The motion to stay is denied.

The motions to proceed in forma pauperis are also denied. No movant provided the Court with an affidavit, memorandum, or any other information support of these motions. See 1993 Kan. Ct. R. Annot. R. 132. The Court, therefore, has no basis to make the determination that the movants cannot afford to pay the costs of an appeal. Furthermore, documents in the

Court file indicate that movants do or may have the ability to pay for the costs of the appeal.

Therefore, all motions to proceed in forma pauperis are denied.

The motion are denied.

IT IS SO ORDERED.

"S/ MARLA J LUCKERT"
Marla J. Luckert, District Judge

COPIES TO:
Caroline Ong
Charles Berry
Sherrie Berry
Susan Berry
Benny Berry
William Racette
Darrel Berry
Roger J. Weber
Barbara Soza
Denise Merklein

NOT DESIGNATED FOR PUBLICATION

No. 70,841 APPENDIX 7

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

State ex rel. JAMES W. PARRISH,
Securities Commissioner of the State of Kansas
Appellee

v.

MARY SCHERMERHORN, SPENCER LEE SCHERMERHORN, LARRY UTHE, LEANN K. RACETTE, DALE SHARPE, KARLA SHARPE, KENNETH KESSEN, DAVID W. GROTHUSEN, DEANNA G. GALENTINE, and ARTHUR R. DUNSWORTH,
Defendants

and

CHARLES W. BERRY, SHERRIE R. BERRY, SUSAN E. BERRY, BENNY W. BERRY, WILLIAM L. RACETTE, DARREL L. BERRY, ROGER J. WEBER, BARBARA SOZA, and DENISE MERKLEIN
Appellants

MEMORANDUM OPINION

Appeal from Shawnee District Court; MARLA J. LUCKERT, Judge. Opinion filed August 19, 1994. Appeal dismissed Appellants appeared pro se.

Caroline M. Ong, associate general council, of Office of Securities Commissioner of Kansas, for appellee.

Before RULON, P.J., and RICHARD B. WALKER, District Judge, assigned.

ROYSE, J., The State of Kansas, through the State Securities Commissioner, brought this action charging 19 defendants with violating the Kansas Securities Act. The district court granted a motion for summary judgment filed by the State and entered an injunction against further conduct which violates the Kansas Securities Act. Nine of the defendants, all proceeding pro se, have appealed.

An important threshold issue in this case is the

jurisdiction of this court to consider the appellants' arguments. "Appellate review is limited to those rulings which are specified in the notice of appeal." Anderson v. Scheffler, 242 Kan. 857, 861, 752 P.2d 667 (1988). The appellants' notice of appeal, filed November 30, 1993, specified the judgment granted November 19, 1993. The amended notice of appeal, filed January 19, 1994, specified the judgment granted November 19, 1993, and the order filed on January 7, 1994. As a result, this court has authority to review only those two matters: the November 19, 1993, judgment and the January 7, 1994, order.

The briefs filed by the appellants do not mention the November 19, 1993, judgment of the January 7, 1994 order. "Where the appellant fails to brief an issue, that issue is waived or abandoned." Bazine State Bank v. Pawnee Prod. Serv., Inc., 245 Kan. 490, 495, 781 P.2d 1077 (1989), cert. denied 495 U.S. 932 (1990). Therefore, the only two issues properly included in the notice of appeal have been waived.

The appellants' briefs include arguments attacking orders entered by the court on June 25, 1993, and August 20, 1993. Those issues are not properly before us, because they were not included in the notice of appeal. Anderson, 242 Kan. at 861.

Even if the issues briefed by the appellants were properly before us, those issues are without merit. First, appellants claim that the State's action was barred by the one-year statute of limitations contained in K.S>A> 60-514(3). This argument ignores the rule that statutes of limitation do not run against the State unless specifically provided by statute. State ex rel. Schneider v. McAfee, 2 Kan. App. 2d 274, Syl.¶ 2, 578 P.2d 281 (1978). The appellants cite no statute specifically limiting state actions to enforce the Kansas Securities Act.

Second, appellants claim that the State failed to prove that these were not exempt isolated transactions. Appellants, however, acknowledge that this issue was not raised before the trial court. A point not raised before the trial court cannot be raised for the first time on appeal. Bazine State Bank, 245 Kan. at 497. In addition, this argument ignores K.S.A. 17-1272, which places the burden of proof of any exemption on

the party claiming the exemption.

Third, appellants complain that the district court granted summary judgment to the State before discovery was complete. Appellants however, have not cited to anything in the record which shows they had any unanswered discovery requests outstanding at the time the summary judgment was granted. To the contrary, the record indicates that the documents requested by appellants had already been produced. A party cannot escape summary judgment on the mere hope that further discovery may reveal evidence favorable to his case. Gary v. Ray Gill, Frontier Industries, Inc., 208 Kan. 95, Syl. # 1, 490 P.2d 615 (1971).

Fourth, appellants complain that the district court did not grant them additional time to amend their response to the motion for summary judgment. They object that the district court should not hold them to the same standards which apply to litigants who are represented by counsel. In Kansas, however, all parties are bound by the same rules. A pro se litigant in a civil case must comply with the same rules of procedure which are binding upon a litigant represented by counsel. Mangiaracina v. Gutierrez, 11 Kan.App.2d 594, Syl # 1, 730 P.2d 1109 (1986).

Finally, the appellants claim that the Kansas Securities Act is unconstitutionally vague. The Supreme Court has already rejected this argument in State ex rel. Mays v. Ridenhour, 248 Kan. 919, 942-44, 811 P2d 1220 (1991).

Appeal dismissed.

COURT OF APPEAL ORDER DISTRICT CASE NO. 92CV1427

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

APPENDIX 8

BENNY W AND SUSAN E BERRY
1600 11TH ST
DODGE CITY KS 67801

PRO SE

NO. 93-70841-A

STATE EX REL. JAMES W. PARRISH, SECURITIES COMMISSIONER OF THE STATE OF KANSAS, APPELLEE, V MARY L. SCHERMERHORN, SPENCER LEE SCHERMERHORN, CHARLES W. BERRY, SHERRIE R. BERRY, SUSAN E. BERRY, BENNY W. BERRY, WILLIAM L. RACETTE, LARRY UTHE, LEANN K. RACETTE, DARREL L. BERRY, ROGER J. WEBER, BARBARA SOZA, DALE L. SHARPE, KARLA SHARPE, KENNETH KESSEN, DAVID W. GROTHUSEN, DEANNA G. GALLENTINE, ARTHUR R. DUNSWORTH, and DENISE MERKLEIN, APPELLANTS.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

MOTION FOR REHEARING BY APPELLANTS, SHERRIE BERRY, ET AL.
DENIED.

DATE 09/14/94

CAROL G. GREEN
CLERK

COURT OF APPEAL ORDER DISTRICT CASE NO. 92CV1427

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

APPENDIX 9

BENNY W AND SUSAN E BERRY
1600 11TH ST
DODGE CITY KS 67801

PRO SE

NO. 93-70841-A

STATE EX REL. JAMES W. PARRISH, SECURITIES COMMISSIONEF OF THE STATE OF KANSAS, APPELLEE,
V MARY L. SCHERMERHORN, SPENCER LEE SCHERMERHORN, CHARLES W. BERRY, SHERRIE R. BERRY, SUSAN E. BERRY, BENNY W. BERRY, WILLIAM L. RACETTE, LARRY UTHE, LEANN K. RACETTE, DARREL L. BERRY, ROGER J. WEBER, BARBARA SOZA, DALE L. SHARPE, KARLA SHARPE, KENNETH KESSEN, DAVID W. GROTHUSEN, DEANNA G. GALLENTINE, ARTHUR R. DUNSWORTH, and DENISE MERKLEIN, APPELLANTS.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

PETITION FOR REVIEW DENIED.

DATE 11/08/94.

CAROL G. GREEN
CLERK

MAG. NO. CM000332

STATE OF TEXAS

BEXAR COUNTY, TEXAS

VS.

OFFENSE APPENDIX II

MARY VANNOY SCHERMERHORN — UNREGISTERED SECURITIES

This day came on to be heard the Motion of the State Attorney filed herein, asking permission of the court to Dismiss this Criminal Action for the following reasons, to wit:

THE TEXAS STATE SECURITIES BOARD HAS INDICATED THAT THEY DO NOT BELIEVE THIS MATTER VIOLATES THE TEXAS SECURITIES STATUTES. THE TEXAS ATTORNEY GENERAL'S OFFICE HAS TAKEN CIVIL ACTION THROUGH THE DECEPTIVE TRADE PRACTICE ACT. THEREFORE THERE IS NO NEED TO CONTINUE THIS MATTER AT THIS TIME.

which having been heard by the court, the court is satisfied that the reasons so stated are good and sufficient to authorize such dismissal. It is therefore CONSIDERED, ORDERED and ADJUDGED that this Criminal Action be and the same is Dismissed and the Defendant be discharged.

DATE 3\28\90

"s/ JAMES D. BARLOW "
MAGISTRATE
Bexar County, Texas

"s/ NELSON STULL "
Assistant District Attorney

DISTRICT ATTORNEY'S FILE COPY

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION 03
chapter 60 APPENDIX 12

STATE OF KANSAS SECURITIES COMMISSIONER OF KS
Plaintiff

vs. CASE NO. 92CV001427

MARY L. SCHERMERHORN, et al
Defendants

AMENDED Motion to Set Aside Judgment and Vacate Order

COME NOW, THE DEFENDANTS, SHERRIE BERRY, CHARLES BERRY, BENNY BERRY, SUSAN BERRY, WILLIAM RACETTE, LEANN RACETTE, DARREL BERRY, ROGER WEBER, BARBARA SOZA, DEANNA GALLENTINE, DENISE MERKLEIN and moves that this court set aside its judgment in this matter, and vacate the order signed by the court on August 20, 1993 for the reason that there was no basis on which the court could have entered such an order.

REVIEW OF THE FACTS

This case is a companion case to 92CV784. Plaintiff filed this action on November 8, 1990, Then filed 92CV1427 on Nov. 6, 1992. The facts are identical in both cases, the only difference in the 2 cases being the number of Defendants, Plaintiffs have chosen to proceed with 92cv1427.

Appellee, Charles Berry, et al became aware of the program known as World of Product Cooperative, owned and operated solely by Mary Schimmerhorn out of Bracketville Texas. Prior to proceeding, further with the program, however, the Defendants checked with every appropriate Kansas and Texas state agencies regarding the legality of WPC in the state of Kansas, to include the Consumer Protection Agency of the State of Kansas and the Attorney General of the State of Kansas, who gave written assurance that there was no evidence available to that office that WPC was in any way violating Kansas laws. Based on these assurances that no law was being violated, and further based on the fact that the State of Texas had not declared the WPC program illegal, the Defendants felt assured that the program was not unlawful.

Subsequently, the Kansas Security Commission became involved by issuing a summons against the Defendants on Nov. 6, 1992. The Defendants answered the summons and denied all charges in the summons. On May 14, 1993 a pretrial conference was held in which the defendants were granted discovery until Aug. 15, 1993. Subsequent to the pretrial, NO DISCOVERY OR EVIDENCE was presented to the court by either party. No hearing has been held in either case and summary judgment was given to the plaintiff while good faith disputes over material facts were and are still present. A judgment was rendered against the Defendants, based on affidavit and Defendants inability to answer the summary judgement as an attorney and its from that judgment and order that the defendants file this motion.

DEFENDANTS ARGUMENTS

1. Defendants first contention is that there was no basis on which the court could render a decision affirming the conclusion of the Kansas Security Commission. There has been no probable cause or physical evidence presented showing involvement of the Defendants, or, if they were involved, or, the extent of that involvement.

2. The Court declared, in its order that the Wpc program was a pyramid scheme, and in the same order it declared that the program was a security. It is defendants contention that the court is encroaching on the prerogative of the Kansas Legislature. The Kansas Legislature has not declared pyramid schemes illegal in Kansas, and for the court to substitute it judgment for that of the Kansas Legislature is judicial legislation.

3. A security in Kansas is not a matter of arbitrary judgment based on the whims of the Kansas Securities Commissioner and Staff. The Securities are very specifically defined in the Kansas Security Act. That the Kansas Securities Commission was totally without authority to investigate or challenge the legality of WPC, that responsibility was given by the Kansas Legislature to the Kansas Attorney General.

WHEREFORE, because of the facts contained herein, defendants move that the court set aside the judgment rendered against these defendants, and the court vacate the order signed by this court on August 20, 1993, and that the court grant such other relief as the court may deem fitting and proper for the defendants.

Respectively submitted

"s/ CHARLES W. BERRY " "s/ WILLIAM RACETTE "

"s/ SHERRIE BERRY " "s/ SUSAN BERRY "

"s/ ROGER WEBER " "s/ DARREL BERRY "

"s/ DENISE MERKLEIN " "s/ BARBARA SOZA "

"s/ BENNY W BERRY"
Benny Berry, for the defendants
C/O 1600 11th Street
Dodge City, Kansas 67801

~~"s/ _____ "~~ ~~"s/ _____ "~~

Certificate of Service

I certify that I have placed a true and correct copy of the Motion to Set Aside Judgment and Vacate Order with sufficient postage affixed thereto, through the United States Mails, to the parties listed below on this 1 day of Sept, 1993.

Caroline M. Ong
Office of the Securities Comm.
618 South Kansas, 2nd Floor
Topeka, Kansas 66603

"s/ BENNY W BERRY "
Benny Berry

I certify that I have placed a true and correct copy of the Motion to Set Aside Judgment and Vacate Order with sufficient postage affixed thereto, through the United States Mail to Office of the Security Comm.,618 S Kansas, 2nd Floor Topeka, Kansas 66603 on the 23rd day of Nov. 1993.

"s/ CHARLES BERRY "
Charles Berry

COURT OF APPEAL ORDER DISTRICT CASE NO. 92CV1427

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

APPENDIX 13

BENNY W AND SUSAN E BERRY
1600 11TH ST
DODGE CITY KS 67801

PRO SE

NO. 93-70841-A

STATE EX REL. JAMES W. PARRISH, SECURITIES COMMISSIONER OF THE STATE OF KANSAS, APPELLEE, V MARY L. SCHERMERHORN, SPENCER LEE SCHERMERHORN, CHARLES W. BERRY, SHERRIE R. BERRY, SUSAN E. BERRY, BENNY W. BERRY, WILLIAM L. RACETTE, LARRY UTHE, LEANN K. RACETTE, DARREL L. BERRY, ROGER J. WEBER, BARBARA SOZA, DALE L. SHARPE, KARLA SHARPE, KENNETH KESSEN, DAVID W. GROTHUSEN, DEANNA G. GALLENTINE, ARTHUR R. DUNSWORTH, and DENISE MERKLEIN, APPELLANTS.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

MOTION TO SET ASIDE JUDGMENT AND VACATE ORDER BY DEFENDANTS.
WILL BE CONSIDERED BY HEARING PANEL.

DATE: 05/19/94

CAROL G. GREEN
CLERK

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION 03
chapter 60 APPENDIX 14

STATE OF KANSAS SECURITIES COMMISSIONER OF KS
Plaintiff

vs.

CASE NO. 92CV001427

MARY L. SCHERMERHORN, et al
Defendants

Application for permission to Amend Appeal

COME NOW, THE ALLEGED DEFENDANTS, SHERRIE BERRY, CHARLES BERRY, BENNY BERRY, SUSAN BERRY, WILLIAM RACETTE, DARREL BERRY, ROGER WEBER, AND BARBARA SOZA to make application to amend our appeal Docket #93-70841-A. The Defendants wish not to vacate or change our original appeal but to add the January 7, 1994 order to the Appeal # 93-70841-A.

The Notice of Appeal was filed on November 30, 1993 in Shawnee County District Court 3rd Judicial District. This appeal was docket on December 27, 1993 Case # 93-70841-A. This Appeal is from the June 25th, 1993 order.

The reason for amending this appeal is to include the following motions in the Appeal.

1. A Motion to Set Aside Judgment and Vacate Order was filed on September 3, 1993 and an Amended motion to Set Aside Judgment and Vacate Order was filed on November 24, 1993. This motion was to correct the signature errors on the original Motion. Plaintiff did not respond to the Amended Motion. The Amended Motion was denied on January 7, 1994. The Defendants also responded to the Plaintiffs response with a Defendants Response Motion filed Sept. 9, 1992 that was also denied. The District Court ruled without jurisdiction as the case had already been appealed to the Kansas Court of Appeals.

2. Motion for Relief from Judgment or Order and Motion for New Trial was filed on November 30, 1993. This Motion was for relief from Judgment for

inadvertence by the Defendants. The District Court erred in its ruling against some of the Defendants. A Motion for New Trial was for the misrepresentation and misconduct of the Plaintiff. Judgment entered on June 25, 1993 is based on an affidavit which was procured by corruption and was entered in bad faith and shows perjury on part of the Affiant. The affidavit does conflict with testimony given on January 15, 1992 by the affiant. The District Court ruled without jurisdiction as the case had already been appealed to the Kansas Court of Appeals. The Order of January 7, 1994 was given prior to the Defendnats afforded the opportunity to respond or reply to the Plaintiffs Response to Motion for Releif from Judgment and Motion for New Trial.

There are still material facts still present. The Defendants were granted discovery and an order granting summary judgment was given prior to the Defendants given an opportunity for discovery, or trial.

The Appellants would consolidate the ruling of June 25, 1993 with the rulings of January 7, 1994 to prevent the Court from becoming confused on the issues involved in this appeal. These Motions will be submitted to the Court of Appeals.

Respectively submitted

"s/CHARLES BERRY" "s/ BENNY W. BERRY"

"s/ SHERRIE R. BERRY" "s/ SUSAN E. BERRY"

Charles Berry
Sherrie R. Berry
C/O RR#3, Box 43
Scott City, Kansas 67871

Benny W. Berry
Susan E. Berry
C/O 1600 11th Street
Dodge City, Kansas 67801

"s/" DARREL BERRY" "s/ ROGER WEBER"

Darrel Berry
C/O 1205 Elizabeth
Scott City, Kansas 67871

Roger Weber
C/O RR#3, Box 174A
Scott City, Kansas 67871

"s/ BARBARA SOZA"

Barbara Soza
C/O 2417 Belmont Place
Garden City, Kansas 67846

"s/Denise Merklein" "s/ William L. Racette"

Denise Merklein
C/O 9801 W 118th St.,Apt 1
Overland Park, Kansas 66210

William L. Racette
C/O 511 W 16th, PO Box 273
Larned, Kansas 67550

Certificate of Service

I certify that I have placed a true and correct copy of the Application for permission to Amend Appeal with sufficient postage affixed thereto, through the United States Mails, to the parties listed below on this 28 day of JAN ,1994.

Caroline M. Ong
Office of the Securities Comm.
618 South Kansas, 2nd Floor
Topeka, Kansas 66603

"s/Benny W. Berry"

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
THIRD DIVISION

filed KS district Court
Aug 20, 1993

STATE ex rel. JAMES W. PARRISH,
Securities Commissioner of the
State of Kansas,

APPENDIX 4 c

Plaintiff,

Case No. 92CV1427

vs.

MARY L. SCHERMERHORN,
SPENCER LEE SCHERMERHORN,
CHARLES W. BERRY, SHERRIE R. BERRY,
SUSAN E. BERRY, BENNY W. BERRY,
WILLIAM L. RACETTE, LARRY UTHE
LEANN K. RACETTE, DARREL L. BERRY,
ROGER J. WEBER, BARBARA SOZA,
DALE L. SHARPE, KARLA SHARPE,
KENNETH KESSEN, DAVID W. GROTHUSEN,
DEANNA G. GALLENTINE,
ARTHUR R. DUNSWORTH, and
DENISE MERKLEIN,

Defendants.

ORDER APPOINTING RECEIVER

The above entitled matter comes before the court for review. Having examined the files and records in this matter, the court finds:

1. That in its Order of June 25, 1993, the Court found that certain defendants had violated K.S.A. 17-1254 and 17-1255, and that these defendants had derived monetary gain from their illegal activities. The Court found that the plaintiff was entitled to the relief requested, which included orders for disgorgement of profits and for the appointment of a Receiver.

2. That there exists $292,207.54 in uncollected, outstanding judgments against certain defendants in this action.

3. That funds paid in satisfaction of the outstanding judgments are to be paid into the Treasury of the Clerk of the Court to be disposed of as directed

by the Court.

4. That the plaintiff has no direct entitlement to the funds described above.

5. That the appointment of a Receiver is required and necessary to collect the funds ordered disgorged and to most efficiently and effectively bring about an orderly conclusion to this proceeding.

IT IS, THEREFORE, ORDERED that Joseph P. Huerter, of Topeka, Kansas, should be and is hereby appointed as Receiver to take possession and to collect, keep, and preserve funds paid in satisfaction of the outstanding judgments against the defendants.

IT IS FURTHER ORDERED that the Receiver is hereby authorized to take all such further action and exercise powers necessary or convenient to carry out this Order, which shall include, but not be limited to, the power to institute any and all necessary legal proceedings to enforce execution on the outstanding judgments against the defendants, and execute and file the appropriate legal documents and releases indicating that outstanding judgments have been satisfied. The Receiver is hereby authorized to defend and initiate such equitable or legal actions or proceedings in this or in foreign jurisdictions as the Receiver may deem appropriate to seek enforcement of the judgments or to carry out his duties as Receiver. The Receiver is authorized to employ attorneys and other professionals as he may deem necessary to accomplish his duties. In the performance of these duties, the Receiver and his agents are deemed to be a public officer acting in an official capacity on behalf of this Court and the State of Kansas, and shall have no personal liability for or arising out of their acts or omissions performed in good faith in connection with the services performed pursuant to this or related Orders.

IT IS SO ORDERED that the amounts collected by the Receiver in satisfaction of the outstanding judgments be paid into the Treasury of the Court. All costs, fees and expenses of the Receiver, and all other expenses incurred in connection with his duties, shall be paid from the funds collected and paid in satisfaction of the outstanding judgments.

IT IS FURTHER ORDERED that the Receiver is hereby authorized to act in all ways and exercise all powers necessary or convenient for the purpose of carrying out this Order until discharged by the Court, and that Joseph P. Huerter is hereby directed to file a fidelity

bond in the amount of $10,000.00 to be provided by corporate surety guaranteeing performance of the duties and obligations of his office, such bond being subject to the approval of the Court.

IT IS FURTHER ORDERED that this appointment shall not be effective, nor shall the Receiver exercise any powers or perform any duties until he has filed an oath and an approved fidelity bond.

IT IS SO ORDERED.

Entered this 13th day of August, 1993, at Topeka, Kansas.

"S/Marla J. Luckert"
Marla J. Luckert, District Judge